No. 194 & 15.
Brief of Jones & James for U. S.
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JAMES D. MCKENNEY

Revised Brief of Plaintiff in Error reang

... ON ...

RE-ARGUMENT.

Filed Oct. 11, 1897.

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 194.

OCTOBER TERM, 1896.

No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,

JONES & JAMES, Attorneys. Counsel for Plaintiff in Error.

(16,330)

BARNHART & SWINDELLS, CINCINNATI.

INDEX TO BRIEF.

EPITOME OF BRIEF, ... p. ii–xii

I.—STATEMENT OF THE CASE, ... pp. 1–16

II.—ASSIGNMENT OF ERRORS, ... pp. 16–22

III.—ARGUMENT, ... pp. 23–149

1.—First count of indictment—questions as to, . . pp. 23–26

2.—Second count of indictment—questions as to, pp. 26–59

3.—Second count of indictment—erroneous convictions under, ... pp. 59–90

4.—Evidence erroneously admitted, ... pp. 91–106

5.—Evidence erroneously excluded, ... pp. 106–123

6—Charge of Court to jury, part excepted to, . . pp. 124–133

7.—Answer of Court to request number ten for special instruction, ... pp. 134–136

8.—Error for refusing *dedimus*, ... pp. 136–147

9.—Sentence erroneous, ... pp. 147–149

IV.—IN CONCLUSION, ... pp. 150–151

EPITOME OF BRIEF.

I.—First Count of Indictment — Questions as to.

(1.) Where a statute, which provides for the punishment of a crime, does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective, and a demurrer thereto should be sustained. (*Post*, page 23.)

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment, which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective, and a demurrer thereto should be sustained. (*Post*, page 32.)

II.—Second Count of Indictment — Questions as to.

(1.) Where a rate of duty is placed on all species of a certain class of goods, under a generic name, and several species thereof are specifically named on the free list, such generic name applies to every specie of that class, except those specified in the free list. While punctuation may be disregarded, it is the duty of the Court to carry out the expressed, and not the unexpressed intention of Congress. A Court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpreting a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen. (*Post*, page 26.)

(1a.) The Act of August 27, 1894 (28 Stat., 534), paragraph 338, places a duty on "precious stones," and paragraph 467 places "diamonds" on the free list. An indictment charging the smuggling of diamonds states no crime. (*Post*, page 26.)

(2.) An indictment should directly, expressly, and fully state facts constituting a crime without any uncertainty, ambiguity, and not by conjecture, inference, or implication. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment shall so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion, in the language of the statute, will not be sufficient. (*Post*, page 26.)

(2a.) If paragraph 338 of the Act of August 27, 1894 (28 Stat., 534), places a duty on "precious stones;" and paragraph 467 places "miners', glaziers', and engravers' diamonds not set," on the free list, an indictment for smuggling is demurrable which merely charges the unlawful bringing in of "diamonds," but must name a kind of diamonds other than those mentioned in the free list. A mere legal conclusion, in the language of the statute, in such indictment, "that they were "goods, wares, and merchandise subject to duty by law" is not such an allegation, because the facts must be stated, so an inspection of the record will show, as a matter of law, that they were subject to duty, and thus amenable to the smuggling law. (*Post*, page 26.)

(3.) Revised Statutes of the United States, Section 1025, does not apply to a case where an indictment charges no crime, or where it omits an allegation of substance, but only where an indictment is defective in a manner of stating some matter of substance. (*Post*, page 27.)

(4.) Where an indictment omits a matter of substance, a demurrer is the proper remedy to raise the question of the insufficiency of the indictment to state a crime, and the defendant is not limited to asking for a Bill of Particulars. To limit the defendant to a Bill of Particulars to be furnished by the District Attorney is to substitute "indictment by District Attorney" for "indictment by Grand Jury." (*Post*, page 27.)

(5.) In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (*Post*, page 27.)

(5a.) If the word "smuggle" be given either its common law or statutory definition, it is insufficient to allege smuggling in the lan-

guage of the statute, but, by allegations of facts, the elements must be set forth. (*Post*, page 27.)

(5b.) The words "clandestinely introduce" do not of themselves fully, directly, and expressly set forth all the elements necessary to constitute an offense, and the facts must be set forth, and it is insufficient to follow the language of the statute. (*Post*, page 27.)

(5c.) In an indictment for smuggling it is insufficient to merely set forth in the language of the statute, that the "goods, wares, and merchandise should have been invoiced," because under section four of the act of June 10, 1890 (26 U. S. Stat., 131), it is not always necessary to invoice goods, and the indictment ought to have stated facts showing the goods should have been invoiced, and it was insufficient to follow the language of the statute. (*Post*, page 27.)

III. Second Count of Indictment — Erroneous Conviction Under.

(1.) In order to constitute a violation of the Act of February 27, 1877, 19 Stat., 247, amending Rev. Stat., Sec. 2865, the following elements must exist and be established by the evidence: (a) smuggling or clandestinely introducing into the United States, (b) goods, wares, and merchandise, (c) which should have been invoiced, (d) and as to which the invoice is omitted, (e) goods, etc., subject to duty, (f) the duty not having been paid, (g) done knowingly and willfully, and (h) all with intent to defraud the revenue of the United States. (*Post*, pp. 59-60.)

(1a.) If a statute contain a word having a technical meaning, such word shall be given that technical meaning. The word "smuggle" has a well-defined technical meaning, and means bringing on shore or carrying from shore, goods, wares, or merchandise for which duty has not been paid, or goods of which the importation or exportation is prohibited. (*Post*, page 60.)

(1b.) Criminal statutes are to be accurately and strictly construed, and can not be extended by implication to cases not falling within their terms. Words can not be read into a statute or out of a statute, and this rule is peculiarly applicable to penal laws. The Act of June 22, 1874, 18 Stat., 186, Sec. 4, defines "smuggling" for the purposes of that act. Such definition can not be extended by implication to the Act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat. (*Post*, page 60.)

(1c.) Words of a statute are to be read in connection with those with which they are used. The Act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat., provides a penalty for importing or clandestinely introducing into the United States goods, etc., subject to duty by law which should have been invoiced and without paying the duty. The obligation to pay duty does not arise until after the importation is complete, and if no overt act can be done after the importation is complete, there is no smuggling or clandestinely introducing into the United States. (*Post*, page 60.)

(1d.) The omission to get a consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, the arrival of the ship within the port of Philadelphia, the demand on board the ship for the diamonds by a revenue officer, who makes himself known as such, the taking of the diamonds and delivering the same to him, does not constitute smuggling or clandestinely introducing into the United States. (*Post*, page 60.)

(1e.) It is no offense against the Act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat., when there is no legal obligation to procure an invoice. By Section 4 of the Act of June 10, 1890, 26 Stat., 131, there is no obligation to procure an invoice of personal effects accompanying a passenger, and a Captain of a steamship is a passenger within the meaning of said act, and does not cease to be such by being Captain. Therefore, if the Captain of a steamship smuggles or clandestinely introduces diamonds, without paying duty thereon, he is not guilty of the statutory offense contained in the Act of February 27, 1877, 19 Stat., 247, amending Section 2865, Revised Statutes. (*Post*, page 60.)

(1 f.) The *corpus delicti* must be clearly identified, and without proof of the *corpus delicti* there can be no conviction. If, on a charge of smuggling and clandestinely introducing, a person marks a package in Europe for the purposes of identification, and a package is seized on board a steamship in the port of Philadelphia having no address thereon, there is a failure of proof of the *corpus delicti*, and there can be no conviction. (*Post*, page 60.)

(2.) Revised Statutes, Section 1035, provides that a defendant may be found guilty of an attempt to commit the crime charged, provided such attempt be itself a separate offense. An attempt to smuggle or clandestinely introduce has never been made a separate offense, and there can be no conviction of an attempt. (*Post*, page 60.)

(3.) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after overt acts of an attempt. (*Post*, page 60.)

(3a.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state room on a steamship at Liverpool, omitting them from a ship's manifest, steering the ship into the port at Philadelphia, accompanied with an intention to smuggle, when nothing more is done, while they may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, do not amount to more than overt acts of preparation, and there is no overt act of an attempt to smuggle. (*Post*, page 61.)

(3b.) When such diamonds remained in the state-room of the steamer, where they had been placed at Liverpool, and a revenue officer boards the ship at Philadelphia, and making himself known as such, demands the diamonds, and the Captain goes to the state room, gets the diamonds and delivers them up to the officer, there is no overt act of an attempt to smuggle. (*Post*, page 61.)

IV.—Evidence Erroneously Admitted.

(1.) A person sworn as a witness should be permitted to state only facts to which he was only a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declaration made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible. (*Post*, page 91.)

(1a) When a sea Captain claims that a stranger to him, in Europe, induced him to smuggle diamonds into America, and said sea Captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the Captain arrested by a revenue officer, and a day after the seizure the Captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is

inadmissible, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy.

(2) Hearsay evidence is not admissible to corroborate the statements of a witness made upon the stand. (*Post*, page 91.)

(2 a) A Court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury, that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury, that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe, but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing Court should correct, although not excepted to, or assigned for error, and makes the incompetent evidence especially prejudicial. (*Post*, page 91.)

(3.) When evidence is being adduced during the progress of a trial, a mere general objection is presumed to be the admissibility of the evidence and not to the competency of the instrument of evidence. Hence, a general objection on the trial will not be considered by a reviewing Court as an objection to the competency of a witness, or that an instrument was not properly authenticated. (*Post*, page 91.)

(3 a) It is a general rule that the ground of an objection to the admissibility of evidence should be stated. The reason of the rule is, that the Court and counsel might not be misled. When the record discloses that the Court is cognizant of the grounds of objection, the reason of the abstract rule ceases and the record sufficiently discloses the grounds of the objection, and it is unnecessary to repeat the same, and the reason of the rule ceases of application to the concrete case. (*Post*, page 91.)

(3 b.) The record discloses that a question was objected to and the objection sustained on the ground that the evidence was hearsay. This was followed by a second question, differing only in verbal expression. This question was similarly objected to without specifically stating the ground of the objection. The Court overruled the objection, and an exception was allowed. In such case it was unnecessary to repeat the ground of the objection, because the Court had stated it, and neither

the Court nor counsel were misled. In such case the reason of the abstract rule ceased, and the rule ceased of application to the concrete case. (*Post*, page 92.)

V.— Evidence Erroneously Excluded.

(1.) In every case the following are pertinent hypotheses: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of evidence of the witness. It is competent to introduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury. (*Post*, page 106.)

(1 a.) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or thirty minutes; that the conversation was carried on in Flemish by a friend of the captain; that the stranger wrote an address on a piece of paper, and that he said, "by Adams Express" in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying that he (the Captain) wrote the address on the package in Europe, although the package seized had no address on it. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances, it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds; could not make use of the diamonds in his business, he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypothesis that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to a pertinent hypothesis, the Court must admit it; its weight is for the jury. (*Post*, pp. 106–107.)

(1 b.) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 West Fourth Street, Cincinnati, and handed it to him; that he (the Captain) wrote the address on the package in Europe, although the package seized had no address

on it; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia February 11, 1896; was arrested and the diamonds seized. On his arrest, and thereafter, he claimed to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypotheses that the witness, Captain Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said times and it ought to have been admitted, and it was error for the Court to exclude it. (*Post*, page 107.)

VI.—Charge of Court to Jury — Part Excepted to.

(1.) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court. (*Post*, page 124.)

(2.) A charge of a Court to a jury should cover the whole case, and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt. (*Post*, page 124.)

(2a.) The defendant was charged with importing contrary to law and with smuggling diamonds. A sea captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (a) that a friend in the presence of the defendant gave him the diamonds; (b) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (c) that he wrote an address on the package; (d) that he had been in the habit of bringing over similar small packages, and always reporting to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses, or all of the testimony of one witness, and withdraw from the jury certain hypotheses material to the question of guilt. (*Post*, page 124.)

VII.—Answer of Court to Request Number Ten for Special Instruction.

(1.) It is error for a court in answer to a request for a special instruction to affirm the point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness.

(1 a) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt and inconsistent with any hypothesis of innocence. The Court answered, affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charged as testified to by the prosecuting witness. The effect of such charge is to withdraw from the jury all of the evidence of all of the witnesses, except that of the prosecuting witness, and confine his testimony to so much thereof as pertain to the smuggling charge, as testified to by him, and is error. (*Post*, page 134.)

(1 b.) It is error for a court to instruct the jury to find a defendant guilty generally under an indictment alleging a violation of three provisions of law, if they find the defendant guilty of one provision, which is not sustained by the law and evidence.. (*Post*, p. 134.)

VIII.— Error for Refusing Application for Dedimus.

(1.) It is a maxim that that which is plain is not to be interpreted or construed. When language is plain and unambiguous, a refusal to recognize its natural obvious meaning indicates a purpose to change the law by judicial action, and the courts will refuse to depart from such natural obvious meaning. The Revised Statutes must be treated as a legislative declaration of the statute law on the subjects embraced therein on the first day of December, 1873. When that meaning is plain and unambiguous the courts must adhere to it, and can not resort to extraneous aids. It is a condition precedent to a right to resort to a law repealed by a revision that an ambiguity exists in the law as contained in the evidence. When the meaning of the revision is plain courts can not look to statutes repealed by the revision to see if Congress erred in the revision. (*Post*, page 136.)

(1b.) Revised Statutes of the United States, Section 866, which provides that "any court" of the United States may grant a *dedimus potestatem* in "any case" where it is necessary in order to prevent a failure or delay of justice. The words "any court" and "any case" are plain and unambiguous, and should be given their plain and ordinary meaning. Giving them their plain and ordinary meaning, the words "any court" include a district court, and the words any "case" include a criminal case. Resort can not be had to Section 30 of the Judiciary Act of September 24, 1789, 1 Stat., 90, for the purpose of raising a doubt and then clearing up the doubt by the original statute. (*Post*, page 137.)

(1c.) A person charged with smuggling presented proof in support of an application for a *dedimus* that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (d) that from the amount of the prosecuting witness's income and expenditures, a part of his income was derived from sources other than his wages; (e) record evidence of the prosecuting witness's prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The Court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application

came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure of justice, and the action of the Court was based upon a misapprehension of law and fact. (*Post*, page 137.)

IX.—Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541. (*Post*, page 147.)

(1 a.) Where a person was indicted and convicted for a violation of Section 2865 and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania. (*Post*, page 147.)

(1 b.) Where there is a valid sentence as to a fine, and an invalid sentence as to the imprisonment, and the Court has power to impose fine or imprisonment, the one can be separated from the other, and a reviewing court will affirm as to the fine, issue a mandate to that effect, and declare the imprisonment void. (*Post*, page 147.)

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, *Plaintiff in Error.*	No. 194.	Oct. Term, 1897.
vs.	No. 551.	Oct. Term, 1896.
THE UNITED STATES, *Defendant in Error.*	(16,330)	

Revised Brief of Plaintiff in Error on Re-Argument.

MAY IT PLEASE THE COURT:

This Court, having entered an order, directing that this cause be reargued, we respectfully submit, on the reargument, the following revised brief on behalf of Mr. Herman Keck, plaintiff in error, to wit:

STATEMENT OF THE CASE.

Action to Reverse.—This is an action (original record, pp. 223–229; printed, pp. 118–120) to reverse the judgment of the District Court of the United States for the Eastern District of Pennsylvania, whereby and wherein Mr. Herman Keck, plaintiff in error, was convicted by a jury (original record, p. 35; printed, p. 12) of a violation of Sections 2865

and 3082 of the Revised Statutes of the United States; and was, by the judgment of the Court, sentenced to pay a fine of $200 and be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for a term of one year and pay the costs of prosecution (original record, pp. 45–46; printed, pp. 15–16).

Indictment.—On May 18, 1896, at the May Term, 1896, of the District Court of the United States, for the Eastern District of Pennsylvania, an indictment, containing three counts, was returned against Mr. Herman Keck, plaintiff in error (original record, pp. 3–8; printed, pp. 1–2).

First and Third Counts.—The first count charged him, in the very language of the statute, with importing diamonds contrary to law, contrary to the provisions of Section 3082 of the Revised Statutes of the United States (original record, pp. 3–4; printed, p. 1). The third count, in the same language, charged him with importing diamonds contrary to law, contrary to the provisions of the same section (3082) of the Revised Statutes of the United States, in that he violated the law by concealing diamonds in a small box, contrary to the provisions of Section 2802 of the Revised Statutes of the United States (original record, pp. 6–7; printed, p. 2).

Second Count.—The second count charged him with smuggling diamonds contrary to the provisions of Section 2865 of the Revised Statutes of the United States (original record, pp. 4–6; printed, pp. 1–2).

Application for Dedimus Potestatem.—On the 26th day of May, eight days after the indictment, and the day before he was arraigned, Mr. Herman Keck moved to quash the indictment (original record, pp. 8–12; printed, pp. 3–4). And this motion the Court overruled (original record, p. 13; printed, p. 4). He then demurred to the indictment (original record, pp. 14–17; printed, pp. 5–6). This demurrer the Court overruled (original record, p. 17; printed, p. 6). On the same

day, he filed an application in writing for a dedimus protestatem, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof he presented an affidavit, setting forth important matters, which would have been clearly material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said application; to which ruling of the Court, Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day the United States presented an answer to the application for the dedimus protestatem (original record, pp, 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day the Court again refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22), in the following language, to wit:

"First.—That the statute relied upon is not applicable to the criminal court, nor to the trial of causes therein.

"Second.—That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of granting it avoided."

Mr. Herman Keck, plaintiff in error, duly excepted, which exception was allowed by the Court (original record, p. 34; printed, p. 12). This ruling is assigned as number three in

the assignment of errors (original record, p. 212; printed, p. 114), and is set forth in the petition for a writ of error (original record, pp. 224-225; printed, p. 119).

Third Count of Indictment — Questions as to. — The third count of the indictment can be dismissed from discussion, because the evidence wholly failed to support the same, and the learned trial Court, at the request of Mr. Herman Keck, plaintiff in error, instructed the jury to return a verdict of not guilty thereon (original record, p. 206; printed, p. 111). This leaves for discussion the sufficiency of the first and second counts, the evidence, instructions, charge of court, etc.

First Count of Indictment—Questions as to.—The first count of the indictment was in the very language of the statute, and charged Mr. Herman Keck, plaintiff in error, with importing diamonds contrary to law, contrary to the provisions of Section 3082 of the Revised Statutes of the United States (original record, pp. 3-4; printed, p. 1). It reads as follows:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmation, respectively do present that heretofore, to wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, import and bring into the United States, and did assist in importing and bringing into the United States, to wit: into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress, in such case made and provided, and against the peace and dignity of the United States of America."

On May 26, 1896, Herman Keck, plaintiff in error, moved the Court to quash said count in the indictment for various reasons (original record, pp. 8-13; printed, pp. 3-4), and on the same day the Court overruled the motion (original record,

p. 13; printed, p. 4), and this ruling was assigned for error as number one in the assignment of errors (original record, pp. 211–212; printed, p. 114).

On the same day Mr. Herman Keck, plaintiff in error, demurred to said first count in the indictment, because the matters therein contained, in manner and form, as stated, were not sufficient in law, and that he was not bound by the law of the land to answer the same, and that, for want of sufficiency of the first count of the indictment, he prayed judgment and dismissal (original record, pp. 14–15; printed, p. 5). The Court overruled said demurrer (original record, p. 17; printed, p. 6), which action of the Court Mr. Herman Keck, plaintiff in error, sets forth as his second assignment of error (original record, pp. 211–212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

At the close of all the evidence, Mr. Herman Keck, plaintiff in error, requested the Court to return a verdict of not guilty on the first count of the indictment, because it did not state any crime, and that it should be entirely ignored. The Court refused to give this instruction (original record, p. 206; printed, p. 111). This action of the Court is assigned for error as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

Mr. Herman Keck, plaintiff in error, moved the Court in arrest of judgment, among other grounds, for the insufficiency of the first count of the indictment (original record, pp. 41–42; printed, p. 14), which motion the Court overruled (original record, p. 222; printed, p. 118). This ruling is assigned as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Second Count of Indictment — Questions as to.— The second

count of the indictment charged Mr. Herman Keck, plaintiff in error, in the language of the statute, with smuggling diamonds, contrary to the provisions of Section 2865 of the Revised Statutes of the United States (original record, pp. 4–6; printed, pp. 1–2). It reads as follows, to wit:

"And the grand inquest, aforesaid, inquiring, as aforesaid, upon their respective oaths and affirmations, do further present that afterward, to wit: upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: into the port of Philadelphia, certain goods, wares, and merchandise, to wit: five hundred and sixty-three diamonds, of great value, to wit: of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced, as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Mr. Herman Keck, plaintiff in error, moved the Court to quash this count of the indictment (original record, pp. 10–11; printed, pp. 3–4), which motion the Court overruled (original record, p. 13; printed, p. 4); and this is assigned as number one in the assignment of errors (original record, pp. 211–212; printed, p. 114).

A demurrer was then interposed by Mr. Herman Keck, plaintiff in error, because said second count and the matters therein contained in manner and form, as set forth, were not sufficient in law, and that he was not bound by the law of the

land to answer the same; and for want of sufficiency of the second count he prayed judgment and a dismissal (original record, p. 15; printed, p. 5). Said demurrer was as follows, to wit:

"And again now comes defendant, Herman Keck, in his own proper person, into court, and having heard the said indictment, and the second count thereof read, says that the said second count of said indictment and the matters therein contained, in manner and form, as the same are above stated and set forth, are not sufficient in law, and that he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify, wherefore, for want of sufficiency of the second count of said indictment in this behalf, the said Herman Keck prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said second count of said indictment specified."

The Court overruled said demurrer (original record, p. 17; printed, p. 6). The overruling of said demurrer is assigned for error as assignment number two in the assignment of errors (original record, p. 212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Mr. Herman Keck, plaintiff in error, moved in arrest of judgment because of the insufficiency of the second count in the indictment, original record, p. 36; printed, p. 12), and the Court overruled said motion in arrest of judgment (original record, p. 45; printed, p. 15). This was assigned for error as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Evidence Erroneously Admitted and Excluded.—There were several errors assigned for the wrongful admission and exclusion of evidence, as follows, to wit:

FIRST.—The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz (original record, p. 59; printed, p. 22).

As appears from the Bill of Exceptions, the story as told by

him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick came in with a person whom the witness indentified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the cafe a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state-room and the paper in a card case in his pocket. Witness never put the package and slip of paper with address on it together (original record, p. 78; printed, p. 34), but wrote the address on package

himself (original record, p. 78; printed, p. 34), although package seized by officer had no address on it. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, Captain, that is a package of diamonds you have got, to to be sent to Cincinnati, and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck, did not recall his name, and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck," and if Mr. Gallen had said "Johnson," witness would not have known the difference, and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony:

Q. "You did not identify him by his name at all, did you?"

A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhyn-

land," was never on the "Rhynland," and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896.

Herman Keck's testimony is a direct and categorical denial of the testimony of Captain Frank Loesewitz.

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney and objected to by Mr. Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97-98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes, sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114).

SECOND.—There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"

A. "Rough."

Q. "What do you do with the rough?"

(Objected to.)

Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."

(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as exception number nine in the assignment of errors (original record, pp. 215–216; printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed, p. 119).

THIRD.— The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25), that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth, may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect. The piece of paper upon which Captain Loesewitz testified the stranger had written the name Van Reeth was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things

he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had, that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214-215; printed, p. 115).

This testimony was material because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he knew Captain Loesewitz (original record, p. 174; printed, p. 92).

General Charge of Court—Exception to.—The story told by Captain Frank Loesewitz on the witness stand has been given substantially (this brief, pp. 7-8), and in reference to the same the Court charged the jury, as follows (original record, p. 208; printed, 112), to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Mr. Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209-210;

printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, pp. 226–227; printed, p. 120).

Special Instructions—Refusal of.—Mr. Herman Keck, plaintiff in error, requested the Court to give certain special instructions, which were refused. They were as follows, to wit:

No. 1. The first request made was for a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and to which refusal an exception was taken (original record, p. 208; printed, p. 112), and was assigned as number ten in the assignment of errors (original record, pp. 216–217; printed, 116).

No. 2. The second request was for a binding instruction to find the defendant not guilty on the first count of the indictment (original record, p. 204; printed, p. 110). This was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and duly assigned for error as assignment number eleven in the assignment of errors (original record, p. 217; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 3. The Court disallowed the third request, but rendered its refusal non prejudicial when it allowed request number seven, which finally disposed of and took the third count of the indictment out of the case (original record, p. 205; printed, p. 110; original record, p. 206; printed, p. 111).

No. 4. The fourth request was for a binding instruction that there was insufficient evidence to make out a case against the defendant, Mr. Herman Keck, upon the second count, and that the jury should find him not guilty upon that count (original record, p. 205; printed, p. 110), which was disallowed by the Court and an exception taken (original record, p. 208; printed, p. 112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218; printed,

p. 116), and in the petition for a writ of error (original record, p. 226; printed, 119).

No. 5. The fifth request for a special instruction to the jury was as follows (original record, p. 205; printed, p. 110), to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that, although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest, and delivering same in America, without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which an exception was duly taken (original record, p. 208; printed, p. 112), and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 6. The Court was requested to give a sixth instruction, to ignore the first count, and this has been heretofore set forth (this brief, p. 5; lines, 17–26) in reference to the indictment (original record, p. 206; printed, p. 111). The request was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and is set forth as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 7. The Court granted the seventh request, and thus disposed of the third count in the indictment (original record, p. 206; printed, p. 111).

No. 8. The Court was requested to give an eighth instruction (original record, p. 206; printed, p. 111), which the Court refused to give, and an exception was noted (original record, p. 208; printed, p. 112), and appears as assignment number fifteen in the assignment of errors (original record, p. 220; printed, p. 117).

No. 9. The Conrt gave the ninth request (original record, p. 207; printed, p. 111).

No. 10. Upon the matter of the burden and degree of proof, the Court, in its general charge to the jury, stated as follows (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond a reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject Mr. Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, pp. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony

heard, that the defendant *is guilty of the smuggling charged, as testified to, by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Mr. Herman Keck, plaintiff in error, duly excepted to the answer of the learned Court, to the request for said instruction number ten (original record, p. 208; printed, p. 112), and the ruling of the Court was duly assigned as error number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

Assignment of Errors.

(Original record, pp. 211–222; printed, pp. 114–118).

Now comes the defendant, Herman Keck, in this action,—in connection with his petition for a writ of error—makes the following assignment of errors, which he avers occurred upon trial of the cause, to wit:

First.—The Court erred in overruling the motion of the defendant, Herman Keck, to quash each and all of the counts in the bill of *of* indictment; to the overruling of which motion the defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Second.—The Court erred in overruling the demurrer of the defendant in each and all of the counts of the bill of indictment; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the Court.

Third.—The Court erred in overruling and denying the application of the defendant, Herman Keck, for a *dedimus potestatem* to take evidence in pursuance of Section 866 of the Revised Statutes of the United States, which evidence was necessary to prevent a failure and delay of justice, and which evidence was to be obtained from witnesses in Antwerp, Belgium, and Amsterdam, Holland; to which ruling of the

Court *and* overruling *of* said application, defendant, Herman Keck, then and there excepted, and which exception was duly allowed by the Court.

Fourth. — The Court erred in sustaining the objection to and overruling the following questions asked by counsel for defendant, Herman Keck, of the *of the* witness Frank Loesewitz, first produced by the Government, to wit:

Q. "Wasn't she (the Concha) seized for having on board smuggled goods? Weren't smuggled goods found right next to your cabin?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifth.—The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Did the captain give you a description of the man who gave the diamonds to him?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the Court.

Sixth.—The Court erred in overruling the objection made by the counsel for the defendant, Herman Keck, to the following questions asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "I want to ask you whether it was possible for him, Keck, to have seen that there was no address on that package at the time?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there dully allowed by the Court.

Seventh. — The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the follow-

ing question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Was the package held by you at that time so that Keck could see it?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eighth.—The Court erred in sustaining the objection of the United States District Attorney to the following question put to the witness Constant Van Reeth, a witness for the defendant, Herman Keck, to wit:

Q. "Was his name mentioned in the papers at the time he left?"

To which ruling of the Court, defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court; and thereupon defendant, Herman Keck, through Mr. Shields, of his counsel, offered to prove as follows, to wit:

"I offer to prove that at least one year and during a period of one year prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, and referred to by Captain Loesewitz in his testimony, and that it was well-known through the public prints and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business."

And then and thereupon United States District Attorney objected to said offer of proof; which objection the Court sustained, and to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Ninth.—The Court erred in sustaining the objection of the District Attorney to the following question put by counsel for defendant, Herman Keck, on the direct examination of Franz Van Reeth:

Q. "What do you do with the rough?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court, and then and thereupon Mr. Shields, of counsel for defendant, Herman Keck, made the following offer of proof, to wit:

"My purpose is to show that they deal wholly in rough diamonds; that they can not make use of the cut diamonds in their business, and to follow that up by the people who handle their goods and by the people who have them, that they never had any of this kind of material in their place at all, so as to show that there was no motive on the part of these gentlemen to smuggle this stuff in."

Then and thereupon the District Attorney objected to said offer of proof; which objection the Court sustained, and then and thereupon the defendant, Herman Keck, excepted; which exception was duly allowed by the Court.

Tenth.—The Court erred in making the charge to the jury in refusing to state to said jury and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eleventh.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the first count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Twelfth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Thirteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fourteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that, as the first count in the bill of indictment insufficiently states any crime against the laws of the United States, said first count in the bill of indictment is to be entirely ignored by them and not considered."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the second count in the bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the Statutes upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein and therefor, your verdict must be not guilty upon the second count of the bill of indictment."

To which refusal to so instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Sixteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted, which exception was then and there duly allowed by the Court, and the Court thereupon said it would affirm the point generally and would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the Court to give said instruction as asked, which request the Court refused, and to which refusal and ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventeenth.—The Court erred in charging the jury, among other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the Court.

Eighteenth.—The Court erred in overruling the motion of defendant, Herman Keck, to grant him a new trial; to which ruling of the Court, defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Nineteenth.—The Court erred in overruling the motion in arrest of judgment of defendant, Herman Keck; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

ARGUMENT.

I.

First Count of Indictment—Questions as to.

(1.) Where a statute, which provides for the punishment of a crime, does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective, and a demurrer thereto should be sustained.

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective, and a demurrer thereto should be sustained.

The first count in the indictment is as follows (original record, pp. 3–4; printed, p. 1), to wit:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, respectively do present that heretofore, to wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit: Into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

It is based upon the following section of the Revised Statutes of the United States, to wit:

"Section 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation,

knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The count was confined to the first paragraph of said section, which is in the following language, to wit:

"SECTION 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise contrary to law," etc.

Said first count in no manner stated how the importation and bringing in, were contrary to law, or what law they were contrary to, but merely alleged the legal conclusion, in the language of the statute, that they were contrary to law.

It is an elementary rule of criminal pleading, that the defendant should be apprised of the nature of the crime with which he is charged. If, in the case of a statutory crime, the legislative enactment sets forth the facts constituting the offense, it is sufficient if the indictment follow the language of the statute. But when the statute does not set forth the facts constituting the crime, it is not sufficient to repeat the language of the statute in the indictment, but the facts must be alleged. The first count of the indictment is absolutely barren of facts as to how and in what manner the alleged importation and bringing in were contrary to law, or as to what law they were contrary to.

Indictments under the same section (3082) similarly drawn were condemned in the cases of *United States vs. Kee Ho*, 33 Federal Reported, 333 (1887); *United States vs. Claflin*, 13 Blatchford, 178 (1875), and *United States vs. Thomas*, 4 Benedict, 370, 375; S. C. 2 Abbott, 114 (1870). The Supreme Court of the United States applied the same rule under

another statute in the case of the *United States vs. Simmons*, 96 U. S. (6 Otto), 360 (1877). Mr. Justice Harlan, in delivering the opinion of the Court, said, among other things (at page 362), that:

"Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop Crim. Proc., Sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

This Court has applied the same rule in *United States vs. Cruikshank*, 92 U. S., 542, 557 (1875); *United States vs. Mann*, 95 U. S., 580 (1877); *United States vs. Simmons*, 96 U. S., 360, 362–363 (1877); *United States vs. Carll*, 105 U. S., 611 (Mr. Justice Gray, at pp. 612–613) (1881); *United States vs. Hess*, 124 U. S., 483 (Mr. Justice Field, at pp. 486–487) (1888); *Pettibone vs. United States*, 148 U. S., 197 (Mr. Chief Justice Fuller, at p. 202) (1892); *Blitz vs. United States*, 153 U. S., 308 (Mr. Justice Harlan, at p. 315) (1893).

The same doctrine has been announced in other cases, such as *State vs. Krueger*, 35 South-Western Reporter, 604, decided by the Supreme Court of Missouri, May 12, 1896.

On the former argument of the case the learned Assistant Attorney-General conceded that this count was demurrable.

Mr. Herman Keck, plaintiff in error, persistently objected to this count of the indictment by moving to quash (original record, pp. 8–10; printed, p. 3); demurring (original record, pp. 14–15; printed, p. 5); asking for a binding instruction to disregard it (original record, p. 201; printed, p. 109), and moving in arrest of judgment (original record, p. 39; printed,

p. 14). The rulings of the Court in denying all of these are assigned as number one (original record, pp. 211–212; printed, p. 114); two (original record, p. 212; printed, p. 114); fourteen (original record, pp. 219–220; printed, p. 117), and nineteen (original record, p. 222; printed, p. 118), in the assignment of errors. It is also set forth in the petition for a writ of error (original record, pp. 226–227; printed, pp. 119–120). These errors have been heretofore enumerated in the statement of the case (this brief, pp. 4–5).

II.

Second Count of Indictment—Questions as to.

(1.) Where a rate of duty is placed on all specie of a certain class of goods, under a generic name, and several specie thereof are specifically named on the free list, such generic name applies to every specie of that class except those specified in the free list. While punctuation may be disregarded, it is the duty of the Court to carry out the expressed, and not the unexpressed, intention of Congress. A court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpretating a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen.

(1a.) The act of August 27, 1894 (28 Stat. 534), paragraph 338, places a duty on "precious stones" and paragraph 467 places "diamonds" on the free list. An indictment charging the smuggling of diamonds states no crime.

(2.) An indictment should directly, expressly, and fully state facts constituting a crime without any uncertainty, ambiguity, and not by conjecture, inference, or implication. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment shall so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion, in the language of the statute, will not be sufficient.

(2a.) If paragraph 338 of the Act of August 27, 1894 (28 Stat. 534), places a duty on "precious stones;" and paragraph 467 places "miners', glaziers', and engravers' diamonds not set," on the free list, an indictment for smuggling is demurrable which merely charges the unlawful bringing in of "diamonds", but must name a kind of diamonds other than those mentioned in the free list. A mere legal conclusion, in the language of the statute, in such indictment, that they were "goods, wares, and merchandise subject to duty by law" is not such an allegation, because the facts must be stated, so an inspection of the record will show, as a matter of law, that they were subject to duty and thus amenable to the smuggling law.

(3.) Revised Statutes of the United States, Sec. 1025, does not apply to a case where an indictment charges no crime or where it omits an allegation of substance, but only where an indictment is defective inia manner of stating some matter of substance.

(4.) Where an indictment omits a matter of substance, a demurrer is the proper remedy to raise the question of the insufficiency of the indictment to state a crime, and the defendant is not limited to asking for a Bill of Particulars. To limit the defendant to a Bill of Particulars to be furnished by the District Attorney is to susbtitute "indictment by District Attorney" for "indictment by Grand Jury."

(5.) In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitue the offense intended to be punished.

(5a.) If the word "smuggle" be given either its common law or statutory definition, it is insufficient to allege smuggling in the language of the statute, but, by allegations of facts, the elements must be set forth.

(5b.) The words "clandestinely introduce" do not of themselves fully, directly, and expressly set forth all the elements necessary to constitute an offense, and the facts must be set forth, and it is insufficient to follow the language of the statute.

(5c.) In an indictment for smuggling it is insufficient to merely set forth in the language of the statute, that the "goods, wares, and merchandise should have been invoiced," because, under section four of the act of June 10, 1890 (26 U. S. Stat. 131), it is not always necessary to invoice goods, and the indictment ought to have stated facts showing the goods should have been invoiced, and it was insufficient to follow the language of the statute.

The second count of the indictment charges no crime. Said second count of the indictment is as follows (original record, pp. 4–6; printed, 1–2) to wit:

"And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present that afterwards, to wit: Upon the day and year aforesaid, the said Herman Keck, late of the District aforesaid, yeoman, at the District aforesaid, and within the jurisdiction of this court, did knowingly, willfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: Into the Port of Philadelphia, certain goods, wares and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: Of the value of Ten Thousand Dollars, without paying and accounting for the duty imposed upon the said goods, wares and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and

clandestinely introduced, as aforesaid, were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares and merchandise had not been paid and accounted for, and that the said goods, wares and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with the intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case as made and provided, and against the peace and dignity of the United States of America."

This count of the indictment was duly demurred to (original record, p. 15; printed, p. 5) in the following language:

"And again now comes defendant, Herman Keck, in his own proper person, into court, and having heard the said indictment and the second count thereof read, says that the said second count of said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore for want of sufficiency of the second count of said indictment in this behalf, the said Herman Keck prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said second count of said indictment specified."

The Court overruled said demurrer (original record, p. 17; printed, p. 6).

This action of the court is assigned as number two in the assignment of errors (original record, p. 212; printed, p. 114).

This count of the indictment is based upon the provisions of the Act of February 27th, 1877, 19 U. S. Statutes at Large, Chapter 69, page 247, amending Section 2865 of the Rev. Stat. of the United States, to wit:

"If any person shall knowingly, and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom house any false, forged or fraudulent invoice, every such person, his, her or their aiders or abettors, shall

be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

This count of the indictment does not state a crime, for one or all of five reasons: *First*, diamonds are on the free list; *Second*, if all diamonds be not on the free list, as some diamonds are undoubtedly on the free list, the indictment should have named diamonds which are subject to duty; *Third*, in the charge as to "smuggling" the indictment should have alleged the facts; *Fourth*, in the charge as to "clandestinely introducing," the indictment should have stated the facts; *Fifth*, no facts are stated showing that the diamonds ought to have been "invoiced."

First. Diamonds are on the free list. The act of August 27, 1894 (28 U. S. Statutes at Large, Chapter 349, pp. 509–571), is entitled, "An act to reduce taxation, to produce revenue for the Government, and for other purposes."

The first section reads as follows, to wit:

"That on and after the first day of August, 1894, unless otherwise specifically provided for in this act, there shall be levied, collected, and paid upon all articles imported from foreign countries, or withdrawn for consumption, *and mentioned in the schedules herein contained*, the rates of duty, which are by the *schedules and paragraphs respectively prescribed*, namely:—"

Under "Schedule N—Sundries"—division entitled, "Jewelry and Precious Stones"—is found the following paragraph (p. 534), to wit:

"338. Precious stones of all kind, cut, but not set, twenty-five percentum *ad valorum;* if set and not specially provided for in this act, including pearls set, thirty percentum *ad valorum;* imitations of precious stones, not exceeding an inch in dimensions, not set, ten percentum *ad valorum.* And on uncut precious stones of all kinds ten per centum *ad valorum.*"

If this were the only schedule and paragraph of the tariff law, it is clear that diamonds would fall under the generic

term of "Precious Stones." But under the title of the "Free List" is found the following schedule (p. 539), to wit:

"467. Diamonds; miners,' glaziers,' and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

This specific provision takes diamonds out of the general class of precious stones, and makes them non-dutiable. *Arthur vs. Rheims*, 96 U. S., 143 (1877); *Arthur vs. Lahey*, 96 U. S., 112 (1877). While the punctuation, in the use of a semicolon, may be disregarded, it is the duty of the Court to carry out the expressed and not the unexpressed intention of Congress. It is a rule of interpretation, that you are to ascertain not what a legislative body meant, but what it meant by what it said. *United States vs. Schilling*, 11 U. S. App., 603 (1892). A court can not inject into a statute a provision because it is the Court's belief that such provision accords with the settled policy of Congress. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1 (1894). If we were to concede, for the sake of argument, that a case of doubt arose, such doubt must be resolved in favor of the citizen whose property is to be taxed. Taxation can only be imposed by direct and positive provision of law, and not by implication, construction, or conjecture. Every doubt must be resolved in favor of the citizen. *American Net and Twine Co. vs. Worthington*, 141 U. S., 468 (1891); *Henderson vs. United States*, 66 Fed. Rep., 53, 56 (1895); *Hartranft vs. Wiegmann*, 121 U. S., 609 (1876); *United States vs. Isham*, 17 Wallace, 496, 504 (1873); *Powers vs. Barney*, 5 Blatchford, 202 (1863); *United States vs. Wigglesworth*, 2 Storey, 369, 373–374 (1842); *Adams vs. Bancroft*, 3 Sumner, 384, 387 (1838).

The Board of General Appraisers accepted the above construction and held all diamonds to be upon the free list. This finding was reversed in the case of the *United States vs. Frankel*, 68 Fed. Rep., 186 (1895). Judge Townsend, who delivered the opinion, based his conclusions upon the prem-

ises that the word "diamonds" was a sub-heading. This might be sound, if nothing but diamonds were found within the language of paragraph 467. But in addition to diamonds we find four other articles included, to wit, diamond dust, diamond bort, jewels to be used in the manufacture of watches, jewels to be used in the manufacture of clocks. While diamond dust and diamond bort are chemically of the same substance as diamonds, they are no more diamonds than is coal. Jewels are not necessarily diamonds, and diamond jewels are never used in the manufacture of clocks, and seldom in the manufacture of watches. This seems to clearly demonstrate the fallacy in the premises assumed by the learned judge deciding the *Frankel Case*. The Court further reasoned that the word "diamonds" must be a sub-heading, otherwise it would not have been followed by the words "miners,' glaziers,' and engravers' diamonds not set." This conclusion does not follow, because if the word "diamonds" made all diamonds free it would include both set and unset. So as to tax *set* miners,' glaziers,' and engravers' diamonds, the natural way so to do was to follow the generic term "diamonds" with the words "miners,' glaziers,' and engravers' diamonds not set," and thereby take out of the free list *set* miners,' glaziers,' and engravers' diamonds.

Second. If all diamonds be not on the free list, as some diamonds are undoubtedly on the free list, the indictment should have fully, directly, and expressly named diamonds which are the subject of duty.

It is an elementary rule of criminal pleading that an indictment must by facts fully, directly and expressly, without any uncertainty and ambiguity, and not by implication, intendment, or inference, charge a crime. *United States vs. Cruikshank*, 92 U. S. 542; S. C. Beale's Cases on Criminal Law, 28 (1875); *United States vs. Mann*, 95 U. S., 580. 585 (1877); *United States vs. Simmons*, 96 U. S., 360, 362 (1877); *United States vs. Carll*, 105 U. S. 611, 612–613 (1881); *United States*

vs. Hess, 124 U. S. 483, 486–487, 487 (1888); *Pettibone vs. United States*, 148 U. S. 197, 202 (1892); *Blitz vs. United States*, 153 U. S. 308, 315 (1893); *Commonwealth vs. Newbury Port Bridge*, 9 Pick. 142 (1829); S. C. Beale's Cases on Criminal Law, 37; *State vs. Brown*, 3 Murphy (N. C.) 224, 225 (1819); S. C. Beale's Cases on Criminal Law, 19.

By paragraph 338 of the act of August 27, 1894, 28 U. S. Stat. at Large, 509, there are three specific rates of duty imposed upon *genuine* precious stones, depending upon their character, and a fourth rate of duty upon imitations of precious stones.

As recognized by the world, diamonds have been named and are known by specific designations, such as miners' diamonds, glaziers' diamonds, engravers' diamonds, brilliant diamonds, rose diamonds, briolette diamonds, table diamonds, engraved diamonds, star diamonds, Indian cut diamonds, point cut diamonds, rough diamonds, cleaved diamonds, close stones, cleavage, cleavings, polished diamonds, blue diamonds, yellow diamonds, white diamonds, Indian diamonds, Brazilian diamonds, South African diamonds, Kimberley diamonds, Bulfontein diamonds, DeBeers diamonds, yellow Cape diamonds, Jaegerfontein diamonds and River Goods, the most beautiful in the world, taken from the bed of the Vaal river. The indictment in this case simply says diamonds, which is a comprehensive enough term to cover the almost infinitive variety enumerated.

Every act is presumed to be lawful, unless it be charged to be done under circumstances which render it criminal. As paragraph 467 (p. 539) names certain diamonds as "diamonds" which are free, and which can only be classed, within the general language of paragraph 338 (p. 534), as "precious stones," the indictment should, in describing the offense, have named diamonds which are dutiable, because, *non-constat*, the diamonds charged in the indictment might be non-dutiable. For all that appears in the indictment, the diamonds alleged to

have been smuggled may have been the diamonds specified in paragraph 467 (p. 539), which are on the free list. For all that appears from the allegation of fact in the second count of the indictment, the diamonds were engravers,' glaziers,' and miners' diamonds not set, and are not to be presumed to be diamonds other than miners,' glaziers,' and engravers' diamonds not set. The indictment must show upon its face, by allegations of fact, that a crime was committed. The Court must be able to tell, upon reading the indictment, from the facts therein alleged, that a crime was committed. If it omit such allegations, the indictment is demurrable, and this count of the indictment was duly demurred to by Mr. Herman Keck, plaintiff in error.

The principles of law herein contended for have been illustrated by the English, Federal, and State courts with unanimity. In *Regina vs. Thomas Cox*, 1 Carrington & Kirwin, 494 (1844), the prisoner was indicted for stealing three eggs, of the value of two pence, of the goods and chattels of Samuel Harris. The evidence showed that the eggs stolen were the eggs of the guinea fowl. In holding this indictment invalid, Lord Chief Justice Tindal said:

"The indictment is insufficient. It should have stated what sort of eggs were stolen, for aught that appears on this indictment the eggs might have been adder's eggs, or some other species of eggs, which can not be the subject of larceny."

So in the case at bar, the diamonds alleged to have been smuggled might have been a species of diamonds, to wit, engravers,' glaziers,' or miners' diamonds not set, which can not be the subject of smuggling. It did not help the indictment in the case cited to allege that they were "of the goods and chattels" any more than in the case at bar to allege "goods, wares, and merchandise subject to duty by law," because the indictment must name a class of diamonds which was subject to duty.

In *Commonwealth vs. Bean*, 11 Cushing (Mass.), 414 (1853);

S. C. Beale's Cases on Criminal Law, 38 (approved in 105 U. S., 613), the revised statutes of Massachusetts (Chap. 126, Sec. 42) punished any person who should maliciously or wantonly break the glass or any part of it in any building not his own. The indictment averred that the defendant maliciously and wantonly broke the glass, to wit, two panes of glass in a certain building not the property of the defendant. After a verdict of guilty, the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own. Mr. B. F. Butler appeared as counsel for the defendant and Mr. R. Choate, the Attorney-General, on behalf of the Commonwealth. Judge Metcalfe, who delivered the opinion of the Court, said (at pp. 414–415) as follows:

"It is admitted by the counsel for the Commonwealth that the section of the statute on which this indictment is framed, was intended to punish the malicious and wanton breaking of glass which is part of a building. And it is argued by him that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in the statute may be and not unfrequently must be ascertained by examination of the context. In the present case, it is from the context that the words "glass in a building" are understood on all hands to mean glass which is part of a building. But the Court, in ascertaining the offense with which the defendant is charged, can not look beyond the words of the indictment itself. If those words do not sufficiently charge the offense which the statute was meant to punish, the indictment is fatally defective. 2 Hawk., c. 25, sec. 111; *Commonwealth vs. Slack*, 19 Pick., 304; *Commonwealth vs. Clifford*, 8 Cush., 215; *Commonwealth vs. Stout*, 7 B. Monroe, 247. We are, therefore, of opinion that the indictment in this case will not sustain a judgment against the defendant. *For aught that the indictment shows, the glass, which he is charged with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building.* Judgment arrested.

In *Commonwealth vs. Newbury Port Bridge*, 9 Pick. 142, (1829); S. C. Beale's Cases on Criminal Law 37, the indictment charged the defendant with having neglected to pro-

vide a proper draw, thereby prevented vessels and river craft from passing the bridge. The defendants moved in arrest of judgment because the indictment did not allege that any bridge had been built. The Court sustained this position and held the indictment bad, in the following opinion (at p. 142), to wit:

"The answer to the first objection is, that the defendants completed the bridge and took toll; and if so we think they were bound to provide the means prescribed by the statute to enable vessels to pass with convenience through the draw. *But we think the objection that the indictment does not allege that any bridge has been built is fatal.*

"*It may be, indeed, inferred by any common reader that there was a bridge; but no lawyer considering that inferences are not to be made in criminal cases, would say it appears that a bridge had been built. There ought to have been an express allegation to that effect.*"

In the well considered case of *State vs. Krider*, 78 N. C., 481 (1878), an indictment was held bad which charged the defendant with stealing "five fishes, the goods and chattels," etc., because there were some kinds of fish, the subject of larceny, and others not the subject of larceny, and the indictment should have set forth a kind that was the subject of larceny.

The indictment in the case of the *United States vs. Cruikshank*, 92 U. S., 542 (1875); S. C. Beale's Cases on Criminal Law 28, was for the violation of Section 6 of the act of May 30, 1870, 16 U. S. Stat. at Large 140, and known as the "Enforcement Act." The counts reviewed by the Court substantially charged the defendant with conspiring to deprive certain citizens of African descent of their rights and privileges under the Constitution of the United States. The indictment charged the crime in the language of the statute, but did not specify any particular right of which the said citizens were deprived. The Court said it was unimportant that the indictment described a statutory offense in the language of the statute, *but the question was whether any offense had been described at all; that there was no specification of any particular*

right, although the language of the indictment was broad enough to cover all.

Chief Justice Waite, in delivering the opinion of the Court, said (at pp. 557–558) as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' (Amendment VI.) In *United States vs. Mills*, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; and in *United States vs. Cook*, 17 Wall., 174, that every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, *to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone.* A crime is made up of acts and intents; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

This language of Mr. Chief Justice Waite very happily illustrates the defect in the second count of the indictment. "Diamonds" is a generic term by the classification made by the statute, and includes, on the one hand, brilliant diamonds, rose diamonds, briolette diamonds, etc., which are subject to one of three rates of duty, and on the other hand, engravers,' glaziers,' and miners' diamonds not set, which are upon the free list.

The indictment, in order to state a crime, should have descended so far to particulars as to state upon its face a species of diamonds upon which duties are levied, to wit, diamonds

* Since the foregoing was printed, the case of *United States vs. Gay*, 80 Fed. Rep., 254, decided April 30, 1897, has come into our hands. A petition for a penalty under the contract labor law was held bad on demurrer, because it alleged "*labor and service*," in the language of the statute; and as some kinds of labor and service were not within the reason and spirit of the statute, the petition should have used such qualifying word as would have described labor and service within the reason and spirit of the statute.

other than miners,' glaziers,' and engravers' diamonds not set. The mere conclusion of law in this count of the indictment, that the "goods, wares, and merchandise were subject to duty by law," will not help the defective indictment, because the indictment should have stated the facts, so that the Court might know, upon reading the indictment, whether the diamonds were subject to duty. This takes us to other and further very significant language of Mr. Chief Justice Waite (at p. 558), as follows, to wit:

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify, with some degree of certainty, the articles stolen; this because the accused must be advised of the essential particulars of the charge against him, *and the court must be able to decide whether the property taken was such as was the subject of larceny.*"

So, in this case, the indictment must describe diamonds with that degree of particularity that the Court may decide, upon reading the indictment, whether the diamonds alleged to have been smuggled were subject to duty, because, as we have seen, there are some kinds of diamonds which are, and some which are not, subject to duty.

In *United States vs. Morrissey*, 32 Fed. Rep., 147 (1887), approved in *Blitz vs. United States*, 153 U. S., 308, 315 (1893), and more particularly analyzed hereafter (this brief, p. 41–42), the same rules were applied.

To omit the name of the diamonds alleged to have been smuggled was the omission of a substantial allegation of fact, and rendered the indictment demurrable; and, in addition to the authorities cited, we refer the Court to the following cases as bearing out our contention, to wit: *United States vs. Mann*, 95 U. S., 580, 585 (1877); *United States vs. Carll*, 105 U. S., 611, 612–13 (1881); *United States vs. Hess*, 124 U. S., 483, 486–7 (1887); *Pettibone vs. United States*, 148 U. S., 197, 202 (1893); *Blitz vs. United States*, 153 U. S., 308, 315 (1893); *Moore vs. United States*, 160 U. S., 268, 272 (1895). And this is the rule, even where the in-

dictment follows the language of the statute. Mr. Justice Gray, in *United States vs. Carll*, 105 U. S., 611, 612 (1881). The omission of any material word, though it be but a preposition, adjective or qualifying word, renders an indictment fatally defective. *Jones vs. State*, 21 Texas Appeals, 349 (1886). The indictment must set forth facts charging a crime, and not conclusions, so that the court may know, from the facts set forth upon the face of the indictment, that a crime has been committed. *United States vs. Cruikshank*, 92 U. S., 542, 557–558 (1875); *Commonwealth vs. Dunleay*, 157 Mass., 386, 388 (1892).

A failure to descend to particulars is only permissible where the Grand Jury has before it the article alleged to have been smuggled, and is unable to determine what the article is, *and then it must insert in the indictment the words, "to the Grand Jury unknown."* *People vs. Bogart*, 36 Cal., 245 (1868).

Upon the first argument of this case to this Court, it was contended by the learned Assistant Attorney-General that the indictment in the case at bar was governed by *Dunbar vs. United States*, 156 U. S., 185 (1895). A cursory analysis of the indictment in the case at bar and in the *Dunbar Case*, clearly shows no similarity between them. In the case cited, paragraph 48 of Section 1 of the act of October 1, 1890, Chapter 1244, 26 U. S. Stat. at Large, 567, placed a duty of $12.00 per pound on "opium prepared for smoking." The third count of the first indictment charged the smuggling of "prepared opium subject to a duty by law, to wit, a duty of $12.00 per pound." (The Court at pp. 187–8.) By paragraph 663 of said act of October 1, 1890, 26 U. S. Stat. at Large, 567, "Opium crude, or unmanufactured and not adulterated, containing nine per centum or over of morphia," was placed upon the free list. So that "opium" was both upon the free list and dutiable list. But no *prepared opium* was upon the free list, and therefore when the indictment in the case charged the importation of "prepared opium," it positively pointed to an opium that was the subject of duty, and which could not have been upon the free

list. The indictment descended from the general class of goods and merchandise, to the generic name opium, then descended to a particular kind of opium, to wit: "prepared opium," *and there was no prepared opium upon the free list.* The indictment, therefore, necessarily charged a crime. In the case at bar, the generic term "diamonds" was used without prefix and suffix, and "diamonds," like "opium," are upon both the dutiable and the free list. If the indictment in the *Dunbar Case* had merely charged the smuggling of "opium," and that the "goods, wares, and merchandise were subject to duty by law," the cases would have been parallel, because there would have been no direct charge of smuggling a thing capable of being smuggled. But in the case cited the indictment was for "*prepared* opium," and not merely "prepared opium, which goods, wares, and merchandise were subject to duty by law," but "prepared opium" subject to duty of "$12.00 per pound," the specific rate named for prepared opium by paragraph 48 of the act of Oct. 1, 1890, 26 U. S. Stat. at Large 567. By paragraph 467, act of Aug. 27, 1894 (28 U. S. Stat. at Large, 509), there are three separate rates of duty for dutiable diamonds, and a fourth for imitation diamonds. The learned Assistant Attorney-General is clearly in error when he says there is but one rate of duty.

In the *Dunbar Case* no question was raised as to the sufficiency of the indictment until after the verdict (opinion of Court, pp. 191–192), while in the case at bar, the indictment was duly demurred to.

The objects, purposes, and effects of a demurrer to an indictment are thus set forth in 4 Amer. and Eng. Encyclo. of Law, 777, as follows, to wit:

"A demurrer is an objection on the part of the defendant, who admits the facts alleged in the indictment to be true, but insists that they do not, in point of law, amount to the crime with which he is charged."

So thoroughly did counsel for Mr. Herman Keck, plaintiff

in error, believe in the insufficiency of this count of the indictment, that they demurred thereto, fully conscious of the rule of criminal pleading, that in case of a demurrer being overruled, it was wholly in the discretion of the Court to thereafter allow the defendant to plead to the indictment. The rule and reason therefore is thus stated in 4 Amer. and Eng. Encyclo. of Law, 778, to wit:

"Demurrers in criminal cases seldom occur in practice. Not only is there risk of having final judgment against the defendant, but the same objections may be brought forward in other and safer ways. In cases of defects in substance apparent on the face of the indictment, generally the defendant may, instead of demurring, plead not guilty, and then, if convicted, move in arrest of judgment. Thus, he has a double chance of getting off, first, on the facts of the case, then on the points of law. *But this course can not be taken when the defect in the indictment is cured by verdict.*"

Mr. Herman Keck, plaintiff in error, took the course pointed out by Mr. Justice Brown in *Moore vs. United States*, 160 U. S., 268, 276 (1895), and duly demurred to the indictment, because only in this way could the question be raised so as to be reviewed by this court if denied by the trial court, as could not have been done upon a motion to quash. *Durland vs. United States*, 161 U. S., 306 (1895).

It was also urged by the learned Assistant United States Attorney-General that the defect was cured by Section 1025, of the Revised Statutes of the United States, which reads as follows, to wit:

"Section 1025. No indictment found and presented by a grand jury, in any district, or circuit, or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon, be affected by reason of any defect or imperfection *in matter of form only*, which shall not tend to the prejudice of the defendant."

The defect in the second count of the indictment was that it omitted a matter of substance, and not that a matter of substance was alleged defectively. In the *Dunbar Case*, 156 U.

S., 185 (1894), "opium prepared for smoking" was alleged in a defective manner as "prepared opium subject to a duty of $12 00 per pound," and not an entire omission of a matter of substance as in the case at bar. And, furthermore, Mr. Justice Brewer calls attention to the fact (at pp. 191–2) that the sufficiency of the indictment was not raised until after verdict. It was well said (at p. 276) in the later case of *Moore vs. United States*, 160 U. S., 268 (1895), in an opinion delivered by Mr. Justice Brown (in which Mr. Justice Brewer, who delivered the opinion in the *Dunbar Case*, concurred) that where there is a demurrer to a count which is overruled, the objection is neither covered by Revised Statutes, Section 1025, nor cured by a verdict. And in the *Dunbar Case*, Mr. Justice Brewer said (p. 192) that Section 1025 "is not to be construed as permitting the omission of any matter of substance."

In the case of the *United States vs. Morrissey*, 32 Fed. Rep., 147 (1887), the defendant was indicted under Revised Statutes of the United States, Section 5515. This section is as follows, to wit:

"Section 5515. Every officer of election at which any representative or delegate in Congress is voted for, whether such officer of election is appointed or created by or under any law or authority of the United States, or by or under any statute, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, or procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections, made a crime, or to omit to do any duty, the omission of it which is, by this, or any of such sections made a crime, or attempts to do so, shall be punished as described by Section 5511."

It is apparent that at the election referred to by this section, a person could vote for State officers, or representatives in Congress, or both. The indictment charged that at an election held for Congressmen the defendant received ballots from persons whom he knew were not entitled to vote. It did not expressly allege that such persons voted for Congressmen, although the indictment did set forth that a Congressional election was being held. Mr. Circuit Judge Brewer (now Mr. Justice Brewer) delivered an opinion holding that the indictment did not charge a crime. Mr. District Judge Thayer delivered a concurring opinion (at p. 152–3) that the indictment was not cured by Section 1025 of the Revised Statutes of the United States. In the case at bar the indictment charged the smuggling of diamonds without naming a kind of diamonds subject to duty, there being diamonds subject to duty and diamonds not subject to duty. This is hardly to be distinguished from the *Morrissey Case*, in which there were ballots cast as charged in the indictment, some of which were ballots for State officers, and as to which no Federal crime could be committed, and others as to Congressmen, as to which a Federal crime could be committed, and the indictment omitted to allege that the ballot was cast for a Congressman. There were in the *Morrissey Case* allegations of conclusions, in the language of the statute, but the Court held that the indictment did not state all of the substantial facts to make out a crime. (Mr. Circuit Judge Brewer, at p. 151; Mr. District Judge Thayer, at pp. 152–3.) This case is quoted with approval in *Blitz vs. United States*, 153 U. S., 308, 315 (1893), where its principles are applied.

It was also urged by the learned Assistant Attorney-General that the remedy of the defendant was to ask for a Bill of Particulars. A Bill of Particulars is the proper remedy only where the allegations of the indictment make out a crime, and do not omit a matter of substance. A defendant is to be free from answering a criminal charge, except upon "indictment

by Grand Jury," and "indictment by District Attorney" is an invasion of his rights. *Ex parte Bain*, 121 U. S., 1 (1886). There is no Federal Statute allowing an indictment to be amended; and one allowing a District Attorney to supply a matter of substance by amendment, whatever its form or name, would be unconstitutional.

The rules governing bills of particulars is thus stated in 1 Bishop New Criminal Procedure (4th ed., 1895), Section 643, to wit:

"Sec. 643. *An indictment which the Court can not pronounce ill* may still omit details, to which defendant is justly entitled, before trial. Thereupon the judge, if applied to, orders a written specification of things called sometimes, and perhaps generally, a bill of the particulars, to be filed with the papers in the cause, and on the trial restricts the prosecuting officer in his evidence to the items therein set down. The application for it is addressed solely to the judicial discretion; hence his decision thereon is not generally open to revision by a higher tribunal.

"It does not constitute a part of the record, and is not the subject of a demurrer."

It is stated with great force in 1 Bishop New Criminal Procedure (4th ed., 1895), Section 646, that:

"*The bill of particulars not being made by the Grand Jury, on oath can not supply any defect in the indictment.*

"Nor, in reason, should the Court suffer any otherwise insufficient allegation to pass on the ground that it has power to order particulars from a person not of the Grand Jury."

If, in the case at bar, the indictment had charged the smuggling of "brilliants subject to a duty of twenty-five percentum," the indictment would have charged a crime, but have done so in a way entitling the defendant to a bill of particulars as to number and value. A brilliant is a cut stone having 58 to 62 facets and used for ornamentation, and is therefore dutiable, and the indictment would have stated a crime. The indictment being in the plural number, the defendant would have been entitled to a bill of particulars, showing how

many brilliant diamonds, and perhaps the value thereof. But in the case at bar the indictment simply said diamonds, which might have been diamonds either for industrial use, such as miners,' glaziers,' and engravers' diamonds not set, or the raw material for diamond-cutting establishments, such as rough diamonds, cleaved diamonds, close stones, cleavage, cleavings, or mellee; or the imported finished products, such as brilliant diamonds, rose diamonds, briolette diamonds, table diamonds, Indian cut diamonds, star diamonds, old English cut diamonds, engraved diamonds, etc. Furthermore, the raw material is also named after the country, or part of country, from which it comes, such as Brazilian diamonds, Indian diamonds, South African diamonds. South African diamonds are again divided into the Kimberly diamonds, Belfontein diamonds, Jaegerfontein diamonds, DeBeers diamonds, yellow Cape Hope diamonds, and River Goods, the most beautiful in the world, taken from the bed of the Vaal River. With the lack of particularity in this count of the indictment, the District Attorney, unaided by the Grand Jury, should not be permitted to re-indict the defendant under the guise of a bill of particulars, when *all* elements entering into a description and identification of the diamond are omitted. In *Moore vs. United States*, 160 U. S., 268 (1895), Mr. Justice Brown said (p 272) that property embezzled should be identified with great particularity, and this rule would apply with even greater force to a case of smuggling, where some diamonds are dutiable and some on the free list. In the case of *Commonwealth vs. Dunleay*, 157 Mass., 386, 388 (1892), it was urged that the defect in that case was merely formal, but the Court held otherwise, because there was nothing on the face of the indictment which would enable the Court, on an inspection of it, to determine what should be added or changed to meet the case intended to be relied on. And the same Court, in an opinion delivered by Mr. Chief Justice Gray in *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878), held an indictment bad

which charged adulteration of "confectionery" for similar reasons. The learned Assistant Attorney-General relies on the case of *Durland vs. United States*, 161 U. S., 306; *Connors vs. United States*, 158 U. S., 408; *Cochran vs. United States*, 157 U. S., 286; *Dunbar vs. United States*, 156 U. S., 185.

In the case of *Durland vs. United States*, 161 U. S., 306 (1895), the defendant was charged with using the mail for advancing a scheme to defraud. The indictment did not name the person intended to be defrauded, but alleged that their names and addresses were unknown to the Grand Jury. The indictment identified the letters, but did not give their full contents. The Court properly held (p. 315) that the contents should have been obtained by demanding a Bill of Particulars. In the indictment in the case on trial there was no identification of the diamonds at all.

In *Rosen vs. United States*, 161 U. S., 29 (1895), defendant was indicted for mailing indecent and obscene matter. There was no demurrer to the indictment, and no question raised as to its sufficiency until after a verdict of guilty. The Court held (pp. 40–41) that as the indictment identified the paper and publication the remedy was by a Bill of Particulars.

The case of *Connors vs. United States*, 158 U. S., 408 (1895), decides no question as to a Bill of Particulars. *Cochran vs. United States*, 157 U. S., 286 (1894), decides no question as to a Bill of Particulars. In *Dunbar vs. United States*, 156 U. S., 185 (1895), Mr. Justice Brewer suggests that *perhaps* a Bill of Particulars might have been asked for (p. 192). We have already shown that the *Dunbar Case* is to be widely distinguished from the case at bar. Mr. Justice Brewer (at p. 192) held, that in drawing indictments, to omit a matter of substance, as in the case at bar, could not be remedied by a Bill of Particulars, and quoted *United States vs. Carll*, 105 U. S., 611 (1881), with approval.

It was also urged by the learned Assistant Attorney-General that the allegation "goods, wares, and merchandise subject to

duty by law" was equivalent to "diamonds other than miners', glaziers', and engravers' diamonds," and that he was not compelled in an indictment to negative an exception. These are not words of description to distinguish one kind of diamonds from another, but merely the words of the statute. There is no question of negativing an exception in this case, but a question of omitting matters of substance. This indictment was drawn under Section 2865 of the Revised Statutes, and there are no exceptions to that section. The case of *United States vs. Cook*, 17 Wallace, 168 (1872), is relied on. In that case it was contended by the defendant that the United States, in its indictment, should have negatived the proviso of being beyond the shore and beyond the jurisdiction, in the statute of limitations as to prosecution for an offense. As the statute of limitations and the proviso therein, did not go to a description of the offense itself, the Court held that it was not necessary to negative the matter in the statute of limitations. But that a matter of description can not be omitted is pointed out by Mr. Justice Clifford in the following language (p. 174), to wit:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they can not be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such allegation, *as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.*

"With rare exceptions, offense consists of more than one ingredient, and in some cases of many, and the rule is universal that *every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.*"

The Court again said (pp. 174–5) that:

"Cases have also arisen, and others may be readily supposed, where the exception, though in a subsequent clause or

section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated, as an amendment, with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge, in the form of an indictment, with accuracy and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section, or statute. *Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty.*"

In *Hirn vs. State*, 1 Ohio St., 15 (1852); S. C. Beale's Cases in Criminal Law, 25, the rule is laid down as follows:

"A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; *but as the exception of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment.*"

The foregoing quotation is from the syllabus, and is of special force, because, under the rules of the Supreme Court of Ohio, the syllabus is prepared by the judge, concurred in by his associates, and becomes the law of the case. Judge Bartley, who delivered the opinion of the Court, stated (at pp. 24–25) as follows, to wit:

"It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offense as defined in the statute, so as to bring the defendant precisely within it. And the only substantial reason for requiring this negative averment at all is that without it the description of the offense would not be complete. When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, *enters into and becomes a part of the description of the offense, or a material qualification of the language which defines or creates the offense, the negative allegation in the indictment is requisite.*"

It is clear that the articles mentioned in paragraph 467 of the free list and of paragraph 338 of the dutiable list go to a description and modification of each other,

In the case of *State vs. Brown*, 3 Murphy (N. C.), 224 (1819), S. C. Beale's Cases on Criminal Law, 19, the defendant was charged with being a common Sabbath breaker and profaner of the Lord's Day, in that he sold and exposed to sale divers goods, wares, and spirituous liquors to negroes and others. The indictment did not allege that said negroes and others were not lame or weary travelers. Thereupon the Court arrested the judgment. Judge Henderson, who delivered the opinion of the Court, said (at p. 225) as follows, to wit:

"The Court, upon an inspection of the record, must be able to perceive the alleged criminal act, for an indictment, as was once well observed from this bench by Judge Lowrie, is a compound of law and fact. The latter part of the indictment charges that the defendant kept an open shop and sold divers goods, wares, and spirituous liquors to negroes and others on the Sabbath. This offense as charged is not punishable by indictment, *for if the act can be intended to be lawful, it shall be so presumed unless it be charged to be done under circumstances which render it criminal*, and be so found by a jury. For aught that appears to the contrary, this sale might have been to the lame or weary traveler, or to others to whom it was a merit to sell, instead of a crime; and nothing shall be intended against a defendant. And if this were the sabbath-breaking, spoken of in the foregoing part of the indictment, taking the whole together, the defendant might well have done all charged against him and yet have committed no crime; and as this may have been the case, we are bound to presume it, at least not to presume to the contrary. The judgment must be arrested."

Nor is the mere legal conclusion sufficient that they were "goods, wares, and merchandise subject to duty by law," because the indictment must, by allegations of fact, show that the diamonds were subject to duty; and it was not sufficient to merely follow the language of the statute. *Raugh's Case*, 2 East Pleas of the Crown, 607; *Kind vs. Mason*, 2 Durnford and East, 581, 586 (1788); *People vs. Town of Auditon*, 44

Howard Practice, 238; S. C., 13 Abbot Practice, (N. S.), 431 (1876); *United States vs. Hess*, 124 U. S., 483, 486 (1887).

The indictment in this case was not specifically and definitely drawn as required by the rules of Criminal Pleading and the guarantee provided for in Article VI of the Amendments to the Constitution of the United States. Chief Justice Waite, in *United States vs. Cruikshank*, 92 U. S., 542, 557-8; S. C. Beale's Cases on Criminal Law, 28 (1875); Mr. Chief Justice Gray, in *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878); *Commonwealth vs. McCance*, 164 Mass., 162 (1895); *People vs. Cox*, 48 Cal. 275 (1870); 1 Bishop New Criminal Procedure (4th Ed., 1895), Sections 98 A., 100 A., 101, 108 and 111; Miller's Constitution 509; 2 Story Constitution (5th Ed.) Sec. 1785.

Third. In the charge as to "smuggling" the indictment should have alleged facts constituting smuggling. The indictment merely follows the language of Section 2865 of the Revised Statutes of the United Statutes. It omits to allege acts of smuggling, facts showing how, in what respect, or in what manner, there was any smuggling.

Smuggling is thus defined in 6 Bacon's Abridgment (5th Ed.), 258, to wit:

"Smuggling consists in the *bringing on shore*, or carrying from the shore, goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

It is defined in 1 Hawkins' Pleas of the Crown (8th Ed.), 661, as follows, to wit:

"Smuggling consists in *bringing on shore*, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

The following is laid down in 1 Russell on Crimes (9th Ed.), 172, to wit:

"Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists in *bringing on shore*, or carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

In *Dunbar vs. United States*, 156 U. S., 185 (1895), Mr. Justice Brewer (at p. 193) defines it as follows:

"The fraudulent taking into a country, or out of it, merchandise, which is lawfully prohibited."

There are no common law crimes against the United States Government (*United States vs. Britton*, 108 U. S., 199, 206 (1882); *United States vs. Eaton*, 144 U. S., 677, 687 (1892); and when a Federal law prescribes a punishment for a common-law crime by name, without defining it, the common-law definition is impliedly adopted as part of the statute. *Turner vs. State*, 1 Ohio St., 422, 424 (1853).

In the case of *United States vs. Claflin*, 13 Blatchford, 178 (1875), Judge Benedict adopted the definition contained in the Anti-Moiety Act of June 22, 1874, 18 U. S. Stat. at Large, Chapter 391, p. 186, which define smuggling *for the purposes of that act* in the following language, to wit:

"That for the purposes of this act, smuggling shall be construed to mean *the act*, with intent to defraud, of bringing into the United States, or with like intent attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom house, or submitting them to the officers of the revenue for examination."

If we adopt the common-law definition the indictment should have fully, directly, and expressly alleged that the goods were brought on shore, what shore they were brought on, and how they were brought on shore. Mr. Justice Field stated the rule as follows, in *United States vs. Hess*, 124 U. S., 483, 486 (1888):

"All the material facts and circumstances embraced in the

definition of the offense must be stated, or the indictment will be defective."

Mr. Chief Justice Fuller stated the rule as follows in *Pettibone vs. United States*, 148 U. S., 197, 202 (1893), to wit:

"The general rule, in reference to an indictment, is that *all the material facts embraced in the definition* of the offense must be stated."

If we adopt the definition contained in the Anti-Moiety Act, and which was urged by the learned Assistant Attorney-General, the indictment should have fully, directly, and expressly alleged *an act* of bringing into the United States, without passing the diamonds through the custom house, and further stated what the act was, how it was done, and what custom house the diamonds were not passed through; or have fully, directly, and expressly alleged an act of bringing into the United States, without submitting the diamonds to a revenue officer for examination, and stated what the act consisted of, and what officer of the revenue they were not submitted to for examination; or what act of attempt was done, and how the attempt was made, and what the attempt consisted of. It should not leave the matter to conjecture, whether the defendant was charged with actually bringing in, or that which is repugnant thereto, of attempting to bring in, so that the defendant would have been informed of what he was charged with doing. Mr. Justice Field (at p. 486), in *United States vs. Hess*, 124 U. S., 483, 486 (1888); Mr. Chief Justice Fuller, in *Pettibone vs. United States*, 148 U. S., 197, at p. 202 (1893).

Fourth. In the charge as to "clandestinely introducing," the indictment should have stated the facts. The word "smuggle" means to clandestinely introduce. The word smuggle seems to be synonymous with the words "clandestinely introduce." The word "clandestine" means to withdraw from public notice for an evil purpose. The word "clandestinely"

means in a secret manner. The word "introduce" means to bring in. The word "smuggle" means to secretly bring in, and the words "clandestinely introduce" mean to secretly bring in. The words "clandestinely introduce into the United States" have no technical meaning, and the indictment should have set forth how the acts were clandestine, what were the clandestine acts, what were the acts of introduction, and how the diamonds were introduced. These should have been set forth fully, directly, and expressly, and without any uncertainty and ambiguity, and not inferentially or by way of recital. It was not sufficient to set forth the crime in the language of the statute, because this statute does not set forth all the facts and elements necessary to constitue a "clandestine introduction." In *United States vs. Cruikshank*, 92 U. S., 542; S. C. Beal's Cases on Criminal Law, 28 (1875), the defendant was indicted, *in the language of the statute*, for depriving colored citizens of their rights under the Constitution of the United States, contrary to the sixth section of the act of May 30, 1870, 16 U. S. Stat. at Large, 140, known as the Enforcement Act. The indictment did not set forth what the rights were, and the Court held that it was immaterial that the indictment followed the language of the statute.

In the *United States vs. Mann*, 95 U. S., 580 (1877), an action was brought against the defendant to recover a forfeiture for an alleged violation of Section 3177 of the Revised Statutes. Section 3177 authorized certain officers to enter buildings where subjects of tax are kept, to examine the same. The petition followed the language of the statute and the trial court sustained a demurrer thereto. On error to this Court the judgment of the trial court was affirmed, because the declaration merely followed the language of the statute, and did not set forth with particularity the facts showing a violation.

In *United States vs. Simmons*, 96 U. S., 360 (1877), the de-

fendant was indicted for violating Section 3266 of the Revised Statutes, in that the defendant procured another person to use a still boiler or other vessel for the purpose of distilling with the intent and meaning of the Internal Revenue laws of the United States. The indictment did not name such other person or aver that the same was unknown. The indictment further alleged that such use was in a certain building and on certain premises where vinegar was manufactured and produced. The indictment did not specifically state that vinegar was manufactured or produced at the time the still and other vessels were used for the purpose of distilling. The Court held that although the indictment followed the language of the statute (pp. 362–3), that it should have set forth the facts showing how and in what respect the things were done, and the name of such other person. We have heretofore quoted the language (this brief, p. 25) of Mr. Justice Harlan in this case.

In the *United States vs. Carll*, 105 U. S., 611 (1881), the defendant was indicted for violating Section 5431, of the Revised Statutes of the United States, which is in the following language, to wit:

"SECTION 5431. Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States, with intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent, any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than Five Thousand Dollars, and by imprisonment at hard labor not more than fifteen years."

The indictment followed the language of the statute. Both the statute, and the indictment following it, omitted to allege that the defendant knew the obligations to be false, forged, counterfeited, and altered. It was urged that as the indictment followed the language of the statute that such allegation was unnecessary, but Mr. Justice Gray held otherwise in the following language (pp. 612–613), to wit:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In *United States vs. Hess*, 124 U. S., 483 (1888), the defendant was indicted, in the language of the statute, for a violation of Section 5840 of the Revised Statutes of the United States by a scheme to defraud through the use of the United States mails. The Court held that it was insufficient to describe the offense in the language of the statute, and that the indictment should have descended to particulars constituting devising a scheme, and that such particulars are a matter of substance and not of form.

In delivering the opinion of the Court (pp. 486–487) Mr. Justice Field said:

"The statute upon which the indictment is founded only described the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general, and, with few exceptions—of which the present is not one—the universal rule on this subject is, that *all the material facts and circumstances embraced in the definition of the offense* must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission can not be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital."

And again (p. 487), to wit:

"The doctrine invoked by the Solicitor-General, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used

in the general description of an offense, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.*"

In *Pettibone vs. United States*, 148 U. S., 197 (1893), defendant was indicted, under Revised Statutes, Section 5399 and Section 5440, as amended, 21 Stat., 4, c. 8, for obstructing the administration of justice and conspiring to interrupt the administration of justice. The indictment followed the language of the statute. Mr. Chief Justice Fuller, in delivering the opinion to the Court, said (p. 202) that:

"The general rule, in reference to an indictment, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital."

In *Blitz vs. United States*, 153 U. S., 308 (1894), the defendant was indicted for a violation of Section 5511 of the Revised Statutes of the United States. This section prescribed a punishment—if, at any election for Representative in Congress, a person should knowingly impersonate and vote in the name of any other person. At the election votes were received for both the State officers and Congressmen. The indictment followed the language of the statute, but did not expressly allege that the defendant voted for a Representative in Congress. The Court held the indictment insufficient, and in the course of its opinion, Mr. Justice Harlan said (p. 315) that:

"The general rule that an indictment for an offense purely statutory is sufficient if it pursues substantially the words of the statute is subject to the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *United States vs. Simmons*, 96 U. S., 360, 362; *United States vs. Hess*,

124 U. S., 483, 488. As said in *United States vs. Carll*, 105 U. S., 611, 612, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

To have merely alleged that the diamonds were clandestinely introduced was to violate every rule of criminal pleading, because the words "clandestinely introduce" have no fixed technical meaning, and the indictment should have set forth facts showing in what respect it was claimed the overt acts were clandestine, and what the overt acts were, and should have stated in what respect the overt acts of introduction consisted, and what were the overt acts. As the words "clandestinely introduce" do not of themselves fully, directly, and expressly inform the defendant of the overt acts relied upon, it was insufficient to have merely followed the language of the statute. This is clearly illustrated by the long line of cases (decided by this Court) referred to, and also Bishop Statutory Crimes, Section 418; *Titus vs. State*, 49 N. J. Law, 36 (1886); *People vs. Town of Auditon*, 44 Howard Pr., 238; S. C., 13 Abb. Pr. N. S., 431 (1876). Laws creating crimes must be explicit, so that all men may know what acts to avoid; and an indictment must directly set forth facts bringing the accused plainly and unmistakably within the statute. *United States vs. Brewer*, 139 U. S., 278, 288 (1891).

Fifth. No facts are stated showing that the diamonds ought to have been invoiced. Revised Statutes of the United States, Section 2865, makes it the offense to smuggle goods subject to duty, and which *should have been invoiced* without paying the duty. *Titus vs. State*, 49 N. J. Law, 36 (1886). There are some goods which must be invoiced, and others which it is unnecessary to invoice. The indictment omitted to allege facts showing the diamonds alleged to have been smuggled ought to have been invoiced, and merely followed the language of the statute.

The act of June 10, 1890, 26 U. S. Stat. at Large, 131, to simplify the laws in relation to the collection of the revenues, provides, in Section 4, as follows, to wit:

"SEC. 4. That, *except in case of personal effects accompanying the passenger*, no importation of any merchandise exceeding $100.00 in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee before the collector or his deputy, showing why it is impracticable to produce such invoice."

The indictment should have alleged that the diamonds were not personal effects accompanying a passenger. It was insufficient to follow the language of the statute, as we have already shown (this brief pp. 31–38; pp. 51–56), and the indictment should have directly, expressly, and fully stated *facts* showing that the diamonds should have been invoiced without uncertainty or ambiguity, and not by conjecture, inference, or implication. For all that appears from the face of the indictment, the diamonds may have been the personal effects accompanying a passenger, and no crime could have been committed under section 2865 of the Revised Statutes, as amended February 27, 1877 (19 Stat., 247).

The crime under Revised Statutes of the United States, Section 2865, as amended February 27, 1877, 19 U. S. Stat. at Large, 247, heretofore set forth (this brief p. 28), consists of many elements, one of which is the smuggling of goods "which should have been invoiced." The statute has added this element to the common law crime of smuggling, and the existence of this element is necessary to constitute the offense. *Titus vs. State*, 49 N. J. (Law), 36 (1886).

In *United States vs. Nolton*, 5 Blatchford, 427 (1867), the defendant was indicted for smuggling goods from Canada into the United States in violation of the act of August 30, 1842, 5 United States Statutes at Large, 565, Section 19, now Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877 (19 Stat., 247). This section then, as now,

made it a crime *to smuggle goods "which should have been invoiced."* As the act of March 2, 1821, 3 United States Statutes at Large, 616, Section one (1) did not require "an invoice" when goods were brought into the United States from an adjoining country (Canada), *Mr. Circuit Justice Nelson* quashed the indictment, and held that there could be no violation of Section 19 of the act of August 30, 1842 (5 Stat., 565), now Section 2865, Rev. Stat., as amended February 27, 1877 (19 Stat., 247.)

In the case at bar there are no allegations of fact setting forth the element of the crime that the diamonds alleged to have been smuggled "should have been invoiced." The indictment is barren of any allegation of fact showing that the goods ought to have been invoiced. The indictment merely following the language of the statute, which this court, by a uniformity of decisions, has held to be insufficient. The indictment, therefore, omits an allegation of fact showing that the goods ought to have been invoiced, omits a matter of substance, and the demurrer thereto should have been sustained.

The words, "*except in case of personal effects accompanying the passenger,*" divided goods to be brought into the United States into two classes:

FIRST.—Goods which must be invoiced, and as to which it is possible to violate Rev. Stat., Sec. 2865, amended February 27, 1877 (19 Stat., 247), and be guilty of smuggling;

SECOND.—Goods which need not be invoiced, and as to which it is impossible to violate Rev. Stat., Sec. 2865, amended February 27, 1877 (19 Stat., 247), and as to which one can not be guilty of smuggling.

This indictment to have been good should, therefore, have alleged facts bringing the goods within the first class. The indictment should have expressly alleged that the diamonds were not "personal effects accompanying the passenger." *United States vs. Cook*, 17 Wallace, 168, 174, 174–175 (1872);

Mr. Justice Clifford at page 174 and 174–175 (this brief, pp. 46–47); *Hirn vs. State*, 1 Ohio St., 15, 24–25 (1852); s. c. Beale's Cases on Criminal Law, 25; *Judge Bartley*, at pages 24–25 (this brief, pp. 47–48); *State vs. Brown*, 3 Murphy (N. C.), 224, 225 (1819); s. c. Beale's Cases on Criminal Law, 19; *Judge Henderson* at page 225 (this brief, p. 48). *United States vs. Cruikshank*, 92 U. S., 542, 557–558 (1875); *Mr. Chief Justice Waite*, at pp. 557–558 (this brief, pp. 36–37); *Moore vs. United States*, 160 U. S. 268, 270 (1895); *Evans vs. United States*, 153 U. S., 584, 587 (1894); *United States vs. Mann*, 95 U. S., 580, 583–584 (1877). In the *Titus Case*, heretofore cited (*Titus vs. State*, 49 N. J. Law, 36), the syllabus is as follows, to wit:

"When a statute, in defining a crime, refers by name to another well-known crime, and makes such named crime a constituent of the defined crime, in an indictment for the latter, it is not sufficient to use the mere statutory language, but the particulars constituting the named crime must be shown."

Precedents. It is unsafe to follow precedents, in view of the decisions of this court already cited, the peculiar language of the Anti-Moiety Act of June 22, 1874, 18 U. S. Stat. at Large, 186, Section 4, and the act to simplify the laws in relation to the collection of revenues of June 10, 1890, 26 U. S. Stat. at Large, 131, Sec. 4, and the classification of diamonds by the Act of August 27, 1894 (28 Stat., 509), paragraphs 338 and 467. Mr. Justice Grose (at pp. 586–7) in *King vs. Mason*, 2 Durnford and East, 581 (1788).

III.

Second Count of Indictment — Erroneous Conviction Under.

(1) In order to constitute a violation of the Act of February 27, 1877, 19 Stat. 247, amending Rev. Stat., Sec. 2865, the following elements must exist and be established by the evidence: (a) smuggling or clandestinely introducing into the United States, (b) goods, wares, and merchandise, (c) which should have been in-

voiced, (d) and as to which the invoice is omitted, (e) goods, etc., subject to duty, (f) the duty not having been paid, (g) done knowingly and willfully, and (h) all with intent to defraud the revenue of the United States.

(1 a) If a statute contain a word having a technical meaning, such word shall be given that technical meaning. The word "smuggle" has a well-defined technical meaning, and means bringing on shore or carrying from shore, goods, wares, or merchandise for which duty has not been paid, or goods of which the importation or exportation is prohibited.

(1 b) Criminal statutes are to be accurately and strictly construed, and can not be extended by implication to cases not falling within their terms. Words can not be read into a statute or out of a statute, and this rule is peculiarly applicable to penal laws. The Act of June 22, 1874, 18 Stat. 186, Sec. 4, defines "smuggling" for the purposes of that act. Such definition can not be extended by implication to the Act of February 27, 1877, 19 Stat. 247, amending Sec. 2865, Rev. Stat.

(1 c) Words of a statute are to be read in connection with those with which they are used. The Act of Feb. 27, 1877, 19 Stat. 247, amending Section 2865, Rev. Stat., provides a penalty for importing or clandestinely introducing into the United States goods, etc., subject to duty by law which should have been invoiced and without paying the duty. The obligation to pay duty does not arise until after the importation is complete, and if no overt act be done after the importation is complete, there is no smuggling or clandestinely introducing into the United States.

(1 d) The omission to get a consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, the arriva of a ship within the port of Philadelphia, the demand on board the ship for the diamonds by a revenue officer, who makes himself known as such, the taking of the diamonds and delivering the same to him, does not constitute smuggling or clandestinely introducing into the United States.

(1 e) It is no offense against the Act of Feb. 27, 1877, 19 Stat. 247, amending Section 2865, Rev. Stat., when there is no legal obligation to procure an invoice. By Section 4 of the Act of June 10, 1890, 26 Stat. 131, there is no obligation to procure an invoice of personal effects accompanying a passenger, and a Captain of a steamship is a passenger within the meaning of said act and does not cease to be such by being Captain. Therefore, if the Captain of a steamship smuggles or clandestinely introduces diamonds, without paying duty thereon, he is not guilty of the statutory offense contained in the Act of February 27, 1877, 19 Stat. 247, amending Sec. 2865, Rev. Stat.

(1 f) The corpus delicti must be clearly identified, and without proof of the corpus delicti there can be no conviction. If, on a charge of smuggling and clandestinely introducing, a person marks a package in Europe for the purposes of identification, and a package is seized on board a steamship in the port of Philadelphia having no address thereon, there is failure of proof of the corpus delicti, and there can be no conviction.

(2) Rev. Stat., Sec. 1035, provides that a defendant may be found guilty of an attempt to commit the crime charged, provided such attempt be itself a separate offense. An attempt to smuggle or clandestinely introduce has never been made a separate offense, and there can be no conviction of an attempt.

(3) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after overt acts of an attempt.

(3a) Obtaining diamonds in Europe, with the intention of smuggling into America, omitting to get a consular invoice, placing them in state-room on a steamship at Liverpool, omitting them from a ship's manifest, steering the ship into the port of Philadelphia, accompanied with the intention to smuggle, when nothing more is done, while they may constitute the distinctive offenses of omitting from the manifest, or importing contrary to law, do not amount to more than overt acts of preparation, and there is no overt act of an attempt to smuggle.

(3b) When such diamonds remained in the state-room of the steamer, where they had been placed at Liverpool, and a revenue officer boards the ship at Philadelphia and makes himself known as such, and demands the diamonds, and the Captain goes to the state-room, gets the diamonds, and delivers them up to the officer, there is no overt act of an attempt to smuggle.

The second count of the indictment (original record, p. 4-5, printed pp. 1-2) charged Mr. Herman Keck, plaintiff in error, with having smuggled and clandestinely introduced into the United States 563 diamonds without paying the duty thereon. This charge is based upon the following language of Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877, Chapter 69, 19 U. S. Statutes at Large, 247, to wit:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, * * * * shall be deemed guilty of a misdemeanor."

The only witness on behalf of the United States testifying directly to the alleged transaction was Captain Frank Loesewitz. As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man, and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium, Mr. Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick come with a person whom

the witness identified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there, Mr. Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the cafe a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, 1896.

The record (from the testimony of Captain Loesewitz) shows the facts as follows (original record, pp. 77–79; printed p. 34), to wit:

Q. Where did you put the package—in your pocket loose?
A. I put it loose in my pocket.
Q. Where did you put the paper?
A. Along with it—along with the box.
Q. Loose?
A. Along with the box.
Q. You never tied the paper to it?
A. No, sir.
* * * *
Q. You put that address loose in your pocket, without attaching it to the package in any way?
A. Yes, sir.

Q. When you got aboard the ship, where did you put the package?

A. In the drawer.

Q. Where did you put the paper?

A. Afterwards I put it in a little case.

Q. In a pocket book or something of that kind?

A. Yes, sir; in a pocket book.

By the Court:

Q. Why did you not put the paper containing the address on the package—fasten it there? Why did you keep them separately?

A. I kept that and put it afterwards with the package *in another paper and wrote the address on myself.*

When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27), to wit:

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got to be sent to Cincinnati, and if I did not deliver it I would be arrested.' After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That is all that happened."

The package seized by Officer Gallen had no address upon it (original record, p. 95; printed, p. 44). The package Captain Loesewitz claims to have received from Mr. Herman Keck contained an address put thereon by himself (original record, pp. 77–79; printed, p. 34).

The witness further testified (original record, pp. 81–82; printed, pp. 36–37), that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The testimony of Mr. Herman Keck, plaintiff in error, was a direct and categorical denial of the statements made by Captain Frank Loesewitz, as to all matters directly affecting Mr. Keck.

The Court, in its charge, said to the jury (original record, p. 208; printed, p. 112):

"*Gentlemen of the jury:* The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them, or to dwell upon the law governing the case. It is sufficient to say in this respect, that *if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged.*"

To the following part of the foregoing language, to wit:

"It is sufficient to say in this respect that *if the statements made here under oath by Captain Loesewitz*, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

Mr. Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed p. 120).

Mr. Herman Keck requested the Court to give a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and an exception taken (original record, p. 208; printed, p. 112), and was assigned as number ten in the assignment of errors (original record, pp. 216–217; printed, p. 116). The fourth request was for a binding instruction to return a verdict of not guilty upon this count of the indictment (original record, p. 205; printed, p. 110). The Court disallowed the same and an exception was taken (original record, p. 208; printed, p.

112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218; printed, p. 116), and in the petition for a writ of error (original record, p. 226; printed, p. 119). Assignment number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116) will be more specifically noticed hereafter. Assignment number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117), refers to the answer of the Court to the request for special instruction number 10. The Court said (original record, p. 207; printed, p. 112) to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the *smuggling* charged *as testified to by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilt generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

An exception was taken to this answer of the Court (original record, p. 208; printed, p. 112), and the ruling of the Court was assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117–118).

The rulings of the Court just detailed are erroneous for three reasons: 1. The facts do not constitute smuggling, or clandestinely introducing; 2. An attempt to smuggle, or clandestinely introduce, is not alleged; 3. If an attempt to smuggle, or clandestinely introduce, has been properly alleged, the facts do not make out a case of an attempt.

First.—The facts do not constitute smuggling, or clandestinely introducing. The second count of the indictment is based on Rev. Stat., Section 2865, as amended February 27, 1877, 19 Stat. at Large, Chapter 69, page 247 (heretofore set out; this brief, p. 28). In order to constitute a crime the following elements must exist:

(1) *Smuggling or clandestinely introducing into the United States,*

(2) Goods, wares, or merchandise,

(3) Which should have been invoiced,

(4) And as to which the invoice is omitted,

(5) Goods, etc., subject to duty,

(6) The duty not being paid,

(7) Done knowingly and willfully,

(8) All with intent to defraud the revenue of the United States.

The word "*smuggle*" has a well-defined technical meaning. The authorities, 1 Hawkins' Pleas of the Crown (8th Ed.), 661; 6 Bacon's Abridgement (5th Ed.), 258; and 1 Russel on Crimes (9th Ed.), 172 (heretofore set forth; this brief, pp. 49–50), define smuggling as follows, to wit:

"It consists in *bringing on shore*, or carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

It is a well-known rule of interpretation that if a statute contain a word having a technical meaning, such word shall be given that technical meaning. *McCool vs. Smith*, 1 Black (66 U. S.), 459, 468–469 (1861), quoting *Hillhouse vs. Chester*, 3 Day, 166, with approval; *Grogan vs. Garrison*, 27 Ohio St., 50, 63 (1875); *Abbotsford vs. Johnson*, 98 U. S., 440, 444 (1878); Black on Interp., 130; Sutherland on Stat. Con., 331, 333; Wilberforce on Statute Law (English Ed., 1881), 124–125; Hardcastle on Construction (2d English Ed., 1892), 184; 1 Kent's Commentaries, 462; Maxwell on Interp. (3d English Ed., 1896), 2–3. And, although there are no common-law crimes against the United States Government (*United States vs. Britton*, 108 U. S., 199, 206 (1882); *United States vs. Eaton*, 144 U. S., 677, 687 (1892)), yet when a Federal law prescribes a punishment for a common-law crime by name, without defining it, the common-law definition is impliedly adopted as part of the statute. *Turner vs. State*, 1 Ohio St., 422, 424–425 (1853).

It, therefore, follows that the word "*smuggle*" should be

given the meaning set forth in 1 Hawkins' Pleas of the Crown (8th Ed.), 661; 6 Bacon's Abridgement (5th Ed.), 258; and 1 Russel on Crimes (9th Ed.), 172.

The regular course pursued in shipping merchandise to America is as follows: The invoice is produced to the American Consul at the place where the merchandise is purchased, and the same is duly certified to by the Consul. Act of June 10, 1890, 26 U. S. Stat. at Large, Chapter 407, page 131. An omission to get a consular invoice is not smuggling or clandestinely introducing or an attempt to smuggle. The next step is to put the goods on board the ship. That does not constitute smuggling or clandestinely introducing or an attempt to smuggle. The next step is for the Captain of the vessel to put the goods on his manifest. Revised Statutes United States, Section 2806. An omission so to do is not smuggling or clandestinely introducing or an attempt to smuggle, but is a distinct offense of omitting goods from the manifest. Revised Statutes of the United States, Section 2809. The next step is to steam or sail the vessel from the port of departure into the high seas and then into the port of entry. That is not smuggling or clandestinely introducing into the United States, or an attempt to smuggle. After the ship arrives the manifest must be produced. Revised Statutes United States, Sections 2811 and 2812. An omission to produce the manifest is not smuggling or clandestinely introducing or an attempt to smuggle, but a distinct offense under Revised Statutes of the United States, Section 2814.

If goods be upon board the ship and without a consular invoice, and without appearing upon the manifest, it may be so from one of two reasons: 1. Because there is no intention to take them ashore in that port; or, 2. From a yet unexecuted intention of smuggling them ashore from the ship at the port of arrival. If a person has an intention to smuggle and the ship arrives in the port of entry with the goods on board, there may never be a crime of smuggling or

clandestinely introducing or attempting to smuggle. There may be either a sudden destruction of ship and cargo by storm, or an abandonment of the intention, before attempting to carry it into effect, or a seizure of the goods before an attempt is made to carry the intention into effect. The principle governing each of these classes is the same, all being cases of unexecuted intention, or intention without the overt act, arising, in one case, from the act of God; in the other, from the act of repentance before attempting the wrong, and the last by the act of this government.

The question presented is not whether Mr. Herman Keck, plaintiff in error, is guilty of a crime, but whether he violated the act of February 27, 1877, 19 Stat. at L., 247, amending Section 2865, Rev. Stat. In interpreting a statute it is not proper to take merely the abstract meaning of isolated words. Words are to be taken in the connection in which they are used. Black on Interp., 169; Sutherland on Statutory Construction, Sec. 246, pp. 325–326; Wilberforce, Statute Law (English Ed., 1881), 108–111; Hardcastle, Construction of Statutes (Second English Ed., 1892), 171–172; Maxwell on Interp. (Third English Ed., 1896), 40; *Pennington vs. Coxe*, 2 Cranch., 33 (1804). It is an improper mode of interpretation to take the word "smuggle" or the words "clandestinely introduce" by themselves. As we have heretofore stated (this brief, p. 65–66), the offense under the act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat., eight elements must exist. This statute prescribed a penalty of fine or imprisonment, or both, for (a) smuggling or clandestinely introducing (b) into the United States (c) goods, etc., subject to duty (d) which should have been invoiced (e) without an invoice, (f) *without paying the duty*. The words "smuggle" or "clandestinely introduce" refer to overt acts committed after the obligation has arisen to pay the duty. This obligation does not arise until the vessel arrives within the port of entry with intent to unlade. Carr, Judicial Inter-

pretation of the Tariff Acts, Sec. 97, pp. 44–45. *Arnold vs. United States*, 9 Cranch, 104 (1815); *Hartranft vs. Oliver*, 125 U. S., 525 (1888); *Seeberger vs. Schweyer*, 153 U. S., 609, 611–613 (1894); *Sherman vs. Robertson*, 136 U. S., 570 (1889).

Carr in his commentary on "Judicial Interpretation of the Tariff Acts," 44–45, states the rule thus:

"SEC. 97. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry."

In *Arnold vs. United States*, 9 Cranch 104 (1815), *Mr. Justice Storey* said (p. 120):

"It is further contended that the importation was complete by the arrival of the vessel within the jurisdiction limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States vs. Vowell*, 5 Cranch, 368."

In *Hartranft vs. Oliver*, 125 U. S., 525 (1888), *Mr. Justice Field* said (p. 528):

"Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse; and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the Government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they can not be removed without a permit from the collector. When on ship-board in charge of a custom-house inspector, they are in the same condition, and can not be removed without a like permit. By statute, collectors are required to put one or more inspectors on board of every vessel immediately on her coming within a collection district; and no merchandise can

be unloaded or removed from the vessel without a permit in writing from the collector. Rev. Stat., Sections 2875, 2876."

The foregoing case (*Hartranft vs. Oliver*, 125 U. S., 525) was quoted with approval and applied in *Sherman vs. Robertson*, 136 U. S., 570 (1889), and *Seeberger vs. Schweyer*, 153 U. S., 609 (1894).

Upon the arrival of the steamer Rhynland within the port of entry of Philadelphia, the vessel and its cargo was in the custody of the custom-house officials. Nothing was done. There was no overt act after the constructive possession of the cargo by the custom-house officials, after the importation was complete, *after the obligation to pay duties accrued*, the diamonds having been seized by Revenue Officer Gallen before any overt acts were thereafter committed. And this is true, whether we take the story as detailed by Captain Frank Loesewitz (original record, p. 66; printed, p. 27), or that of Revenue Officer Gallen (original record, pp. 93-94; printed, pp. 43-44), for in both cases Captain Loesewitz delivered the diamonds on board the steamer Rhynland to Revenue Officer Gallen, whom he knew to be such. Even if different legal consequences could be attached to the acts as detailed by Captain Frank Loesewitz and Revenue Officer Gallen, it is clear that no legal consequences could be attached to the facts detailed in the story of Captain Frank Loesewitz, and the learned trial judge based his instructions wholly upon the hypothesis of a belief by the jury in the story told by Captain Loesewitz (original record, pp. 208; printed, p. 112; original record, p. 207; printed, p. 112).

In the case on trial, Captain Loesewitz testified that he put the diamonds in his state-room at Liverpool, where they remained until Mr. Gallen, a revenue officer, came aboard the ship at Philadelphia, made himself known to be a revenue officer, and demanded the diamonds, and they were thereupon delivered to Mr. Gallen (original record, p. 66; printed. p. 27). It therefore follows that the diamonds were never smuggled

or clandestinely introduced. Such being the case, it was clearly erroneous for the Court to charge the jury that if they believed the story of Captain Loesewitz they must find the defendant guilty; to refuse the request to find the defendant not guilty; to refuse the request to find the defendant not guilty on the second count in the indictment; to say to the jury in response to a request for a special instruction, that they should return a verdict of guilty, generally, if they were convinced that the defendant was guilty of smuggling as charged, as testified to by Captain Loesewitz. The authorities are conclusive that there was no smuggling. It was well said in 6 Bacon's Abridgment (5th Ed.), 286 that:

"As the offense of *smuggling is not complete* unless some goods, wares, or merchandise *are actually brought on shore*, or carried from shore contrary to law, a person may be guilty of divers practice which have a direct tendency thereto, *without being guilty of the offense.*"

It was contended, at the former argument of this case, by the learned Assistant Attorney-General, that the definition of the word "smuggle" contained in Section 4 of the Anti-moiety Act of June 22, 1874, 18 Stat. at L., 186, Chap. 391, is to be given the word "smuggle" contained in the act of February 27, 1877, 19 Stat. at L., Chap. 69, p. 247, amending Section 2865, Rev. Stat. The definition of the word "smuggle" as contained in the Anti-moiety Act is expressly confined to that act, in the following language, to wit:

"SEC. 4. . . . *Provided*, that *for the purposes of this act* smuggling shall be construed to mean," etc.

The meaning of a legislative body is to be determined by what it says in its statutes. The expressed meaning is to govern. *Lake County vs. Rollins*, 130 U. S., 662, 670 (1889); *Thornley vs. United States*, 113 U. S., 310, 313 (1885); *Bruner vs. Briggs*, 39 Ohio St., 478, 484 (1883); *Woodbury vs. Berry*, 18 Ohio St., 456, 461–462 (1869). It is a settled principle of interpretation, that you can neither read words into a statute, nor out of a statute, and this rule is peculiarly applicable to penal

laws. The Anti-moiety act was passed June 22, 1874, and confined the definition of smuggling therein contained to that act. When Congress had before it the bill which subsequently became the act of February 27, 1877, 19 U. S. Stat. at L., Chap. 69, page 247, amending Section 2865, it was fully conscious that the definition contained in the Anti-moiety Act was expressly confined to that act. Criminal statutes are to be accurately and strictly construed, and can not be extended by implication to cases not falling within their terms. *United States vs. Wiltberger*, 5 Wheat., 76, 95–96 (1820); *United States vs. Morris*, 14 Pet., 464, 475 (1840); *Tiffany vs. Bank*, 18 Wall., 409, 410 (1874); *Texas vs. Chiles*, 21 Wall, 488, 491 (1875); *Lewis vs. United States*, 92 U. S. 618, 621 (1875); *United States vs. Reese*, 92 U. S., 214, 220, 221 (1875); *United States vs. Chase*, 135 U. S. 255, 261 (1890); *Sarlls vs. United States*, 152 U. S., 570, 575 (1894); *France vs. United States*, 164 U. S., 676, 682–683 (1897). The Revised Statutes, Section 2865, as amended February 27, 1877, 19 Stat. at L., 247, can not, by implication, be construed to include a part of another statute passed some three years prior thereto, especially when such prior act contained an interpreting clause expressly limited to itself. If Congress intended to apply the same meaning to the act of February 27, 1877, it was easy to say so, and insert words to that effect.

It is next contended by the learned Assistant Attorney-General that if there were no smuggling the evidence makes out a case of "clandestinely introducing." No definition is attempted by him of the words "clandestinely introduce." As already stated (this brief, pp. 51–52), the ordinary meaning of the word "clandestine" means to withdraw from public notice for an evil purpose; the word "clandestinely" in a secret manner; the word "introduce," to bring in; the word "smuggle" means to secretly bring in; and the words "clandestinely introduce" mean to secretly bring in. Both terms, therefore, taken in their ordinary or popular sense, seem to

be synonymous. But the word "*smuggle*" has a well-defined technical meaning (this brief, p. 66); and, therefore, the words, "clandestinely introduce," should be given the same technical meaning as the word "smuggle," because they have the same popular meaning, and are used together. In *Swearingen vs. United States*, 161 U. S., 446 (1896), defendant was indicted for a violation of the Rev. Stat., Section 3893, which enacts that "that every obscene, lewd *or* lascivious book . . . are hereby declared to be non-mailable matter," etc. The indictment alleged that the newspaper article in question "was obscene, lewd, *and* lascivious." It was urged that the indictment was bad for duplicity, but *Mr. Justice Shiras* said (at p. 450):

"If each adjective in a statute described a distinct offense, then these counts would be bad for duplicity, and the defendant's motion in arrest of judgment for that reason ought to have been sustained. We, however, prefer to regard the words, "obscene, lewd, or lascivious," used in the statute as describing one and the same offense. That was evidently the view of the pleader and of the court below, and we think this is an admissible construction."

Mr. Justice Shiras and the concurring justices sustained the indictment, but reversed the judgment upon other grounds. Therefore, the learned Justices who dissented from the reversal concurred in that part of the opinion quoted.

In order to give full force and effect to both Section 2865 and Sections 2806, 2809, 2811, 2814, and 3082, it is proper to construe the words, "clandestinely introduce," found in Section 2865, not to include the offenses enumerated in Sections 2806, 2809, 2811, 2812, 2814, 3082, etc.

It is argued that when a captain of a steamer omits goods from the manifest that the importation is clandestine. The omission from the manifest is a distinct offense under Sections 2811, 2812 and 2814 of the Revised Statutes. Section 2865, as amended February 27, 1877, does not make it as an offense to "*import* clandestinely," but to "*introduce* clandestinely." If Congress intended by the act of February 27, 1877, amending

Section 2865, to punish "clandestine *importation*," it would have used the word "import," instead of the words "clandestinely introduce." It is again argued, that when goods are omitted from the manifest and the vessel enters a port, they are clandestinely introduced. This is equivalent to the other contention, because the entering of a port with an intent to unlade is an importation.

This is a criminal statute and is to be strictly construed. When Congress spoke in the act of February 27, 1877, amending Section 2865 of the Revised Statutes, it did not say "smuggle into a port of the United States," or "clandestinely introduce into a port in the United States;" but "clandestinely introduce *into the United States*." Irregularities in all the other respects were covered by the provisions as to manifests, invoices, entries, and importing contrary to law. They pertain to the port, the coming into the port, the importation. The crime of "smuggling, or clandestinely introducing," is an offense which arises *after* the vessel comes into port, and the importation of the goods thereon was complete. The act of February 27, 1877, 19 Stat. at Large, 247, amending Section 2865, Rev. Stat., provides against *smuggling or clandestinely introducing without paying the duty*. As the obligation to pay duty does not arise until *after* the importation is complete, the words *smuggle or clandestinely introduce* refer to acts after the obligation to pay duty arises. In the case at bar, nothing was done, there was no overt act, after the importation was complete, the diamonds having been seized by Revenue Officer Gallen before any steps could be taken by Captain Loesewitz. (This brief, pp. 68–70.) Statutes are to be construed according to their expressed meaning: *Lake County vs. Rawlins*, 130 U. S., 662, 670 (1889); *Woodbury vs. Berry*, 18 Ohio St., 456 (1869); in connection with the language with which they are used: *Pennington vs. Coxe*, 2 Cranch, 33 (1804); their subject matter: *Silver vs. Ladd*, 7 Wall. 219 (1868); Black on Interpretation, 125; Sutherland Statu-

tory Construction, Sec. 219, p. 209; Wilberforce Statute Law (English Ed., 1881), 175–176; Maxwell on Interp. (3d Eng. Ed., 1896), 74; and full force and effect is to be given to all their provisions by limiting the language of each provision: *Washington Market Co. vs. Hoffman*, 101 U. S., 112, 116 (1879); *Bernier vs. Bernier*, 147 U. S., 242, 246 (1892); *Seymour vs. Ry. Co.*, 44 Ohio St., 12 (1886); *Kemper vs. Campbell*, 44 Ohio St., 210 (1886). An application of these rules to these statutes, and applying them to the facts of the case, fail to show a crime of "smuggling and clandestinely introducing into the United States," no matter what other crimes may be shown and established by the evidence.

Be this as it may, the Court clearly erred in its answer to request for instruction No. 10, when the Court said (original record, p. 207; printed p. 112), that "the jury shall be fully convinced . . . that the defendant is guilty of the *smuggling* charged as testified to by Captain Loesewitz, and that if it is *so* convinced, . . . it will be justified in finding a verdict *of guilty generally*, and should do so. If not *thus* convinced, the defendant is entitled to an acquittal." In other words, if the jury found the defendant guilty of *smuggling*, there would be no alternative but to find the defendant guilty of "*clandestinely introducing*." The learned trial Court seemed to thus treat the words as synonymous, a construction now attempted to be repudiated by the learned Assistant Attorney-General. The learned Assistant Attorney-General contends that the words "clandestinely introduce" have a broader meaning than the word "smuggle." Whether this be true or not, if they have a different meaning, it is clearly error to tell the jury that if they find a man guilty of one crime, they must necessarily also find him guilty of another, although the two are different, and the evidence is insufficient to find him guilty of the crime named in the charge to the jury. Such a doctrine would be fraught with the gravest dangers, and, carried to its logical consequences, would visit the death penalty for a simple assault and battery.

Revised Stat., Sec. 2865, as amended February 27, 1877, 19 Stat. at Large, 247, first appeared as Section 19 of the Act of August 30, 1842, 5 Stat., 565. Rev. Stat., Sec. 3082, first appeared as Section 4 of the Act of July 18, 1866, 14 Stat. at L., Chap. 201, p. 178, p. 179. It is claimed by the learned Assistant Attorney-General that Section 4 of the act of July 18, 1866, 14 Stat., 179, repealed Section 19 of the act of August 30, 1842, by implication. In this he is clearly in error, because Section 4 is directed against "*importing contrary to law*," while Section 19 is directed against "*smuggling and clandestinely introducing into the United States.*" It is a well-known rule of construction that one statute does not impliedly repeal another, unless the two statutes cover the same subject matter and are clearly, explicitly, and directly repugnant to each other. *United States vs. Greathouse*, decided by this Court April 19, 1897, and reported in advance sheets No. 14, page 755; *United States vs. Healey*, 160 U. S., 136, 147 (1895); *Frost vs. Wenie*, 157 U. S., 46, 58 (1895); Black on Interp., 112; Sutherland on Stat. Con., 179–180; Wilberforce Statute Law (English Ed., 1881) 310; Hardcastle Construction of Stat. (2d English Ed., 1892) pp. 345–346; Maxwell on Interp. (3d English Ed., 1896) 214, 255. It is possible, as contended, under express provision of Rev. Stat., Section 5596, that Sec. 19 of the act of August 30, 1842, 5 Stat., 565, was impliedly repealed, because a part of Section 19 was retained in the revision as Section 2865. That Section 4 of the act of July 18, 1866, 14 Stat. at L., 178, Chap. 201, now Section 3082 of the Rev. Stat., meant something different from Section 19 of the act of August 30, 1842, 5 Stat. at L., 565, is clearly apparent from the fact that on February 27, 1877, Congress passed the act found in 19 Stat. at L., 247, Chap. 69, which restored Section 19 of the act of August 30, 1842, 5 Stat. at L., 565, as Section 2865 of the Rev. Stat. of the United States. While it is true that the Revised Statutes of the United States, containing Section 5596, was approved by the President of the United States on June 22,

1874, the same day that the Anti-moiety Act, 18 U. S. Stat. at L., Chap. 391, p. 186, received his approval, the Anti-moiety Act constitutes no part of the revision and the two were not voted on together by Congress. Even if it were proper to give the word "smuggle" the definition contained in the proviso to Section 4 of the Anti-moiety Act, the evidence does not make out an offense, because there was *no act* of passing the diamonds into the United States without passing them through the custom house, or passing them into the United States without submitting them to the officer of the revenue for examination. The Anti-moiety Act specifies that it is "*the act*" of getting goods past the custom house without passing them through the custom house; or "the act" of getting the goods past the officer of the revenue without submitting them to him for examination. The evidence shows no such "act."

To give the Anti-Moiety Act the construction contended for, it would be necessary to read it without the words, "*acts with*," and it would read "smuggling shall be construed to mean the intent to defraud," instead of "*the act* with intent to defraud," etc.

It was earnestly contended by the learned Assistant Attorney-General that the goods were imported, and that if imported they were smuggled or clandestinely introduced. This conclusion does not follow. In his brief he asks the question, "Were the goods imported?" and, having argued that the goods were imported, asserts that, therefore, the case is one of smuggling. Smuggling is not the only offense against the revenue laws. Among the long list of offenses against the revenue laws (some of which we have set out, ante p. 67) is the offense known as "*importing* contrary to law." This crime is founded on Section 4 of the Act of July 14, 1866, 14 Stat. at L., Chap. 201, p. 179, now Section 3082 of the Revised Stat. of the United States. It is a settled rule of construction that full force and effect is to be given to all the

provisions of the law, and when necessary general language of one section is to be restricted so as to give full force and effect to the language of other sections. In order, therefore, to give full force and effect to Section 3082 and Section 2865, as amended February 27, 1877, all violations of the statutes in reference to "*importing*" would be included within and be covered by Section 3082. *Washington Market Co. vs. Hoffman*, 101 U. S., 112, 116 (1879); *Bernier vs. Bernier*, 147 U. S., 242, 246; (1893); *Seymour vs. Ry. Co.*, 44 Ohio St., 12 (1886); *Kemper vs. Campbell*, 44 Ohio St., 210 (1866).

In one of the cases cited (*Seymour vs. Ry. Co.*, 44 Ohio St., 12) plaintiff sued defendant railway company, for killing domestic animals by reason of want of a fence required by statute. The question was whether the action was barred in four or six years. Section 4981 of the Rev. Stat. of Ohio placed a six-year limitation on liabilities created by statute. Rev. Stat., Sec. 4982, placed a limitation of four years on all torts. *Johnson, J.*, said (p. 19) that:

"These two sections must be construed together so as to give each force. If we should say that this cause of action came under Section 4982, we would be compelled to hold that it was not a liability created by statute, or that both four and six years applied to it; but by holding as we do, that Section 4982 applies to injuries and wrongs to person or property other than those to perform a statutory duty, we give force and effect to both sections. This statute requiring railroads to be fenced, and making them liable for damages to personal property by reason of such failure, creates a statutory liability which is barred in six years. While Section 4982 is given full force by limiting it to common-law liabilities for wrongful acts, neglect, or default, such a construction harmonizes and gives full force to both sections."

The same court, in *Kemper vs. Campbell*, 44 Ohio St., 210 (1886), gave full force and effect to both Sections 4133 and 4134 of the Revised Statutes of Ohio, by limiting the word "mortgage," in Section 4133, to one which was a mortgage on its face, and limiting the word "incumbrance," contained in Section 4134, to a mortgage which was not such on its face.

Applying these rules, it is clear that the argument of the learned Assistant Attorney-General would be entitled to weight if it were directed to show that plaintiff, Mr. Herman Keck, was guilty under Section 3082 of "*importing* contrary to law." But the first count of the indictment was based on Section 3082, and as we have shown (this brief, pp. 23–26), and as was conceded on oral argument and on brief by the learned Assistant Attorney-General, this count is fatally defective, and a conviction can not be sustained; and if the evidence would sustain a conviction under Section 3082, and the count of the indictment based thereon was fatally defective, a verdict can not be sustained under Section 2865, as amended February 27, 1877, which the evidence does not fit.

If, for the sake of argument, it be conceded that the word "import" means to bring goods, wares, and merchandise into a port of the United States with intent to land them, and it be further conceded the diamonds charged in the second count of the indictment were brought within the port of Philadelphia with intent to land the same and with the further intent to defraud the revenue of the United States, it does not follow that the defendant is guilty under the act of February 27, 1877, 19 Stat. at L., 247, amending Rev. Stat., Section 2865. Under the act of March 2, 1799, 1 Stat. at L., 646, Section 24, to import goods, wares, and merchandise into the United States, with no bill of lading, no invoice, and no manifest, with intent to defraud the revenue of the United States was clearly unlawful. But the penalty was forfeiture of the goods and the payment of an amount equal to the value of the goods. But this was the only penalty. It was never contended that such a state of facts constituted smuggling or clandestinely introducing into the United States. In the case of *United States vs. 10,000 Cigars*, 2 Curtis, 436 (1855), it appears that cigars were put aboard a vessel in Cuba without bill of lading, invoice, or manifest, with the intent that the master would smuggle them and deliver them to Mr. Davis

at Portland. On the arrival of the vessel the cigars were seized. The question was, whether the goods had been imported into the United States. This was a case of importing contrary to law, and the penalty for this conduct was the forfeiture of the cigars and the payment of an amount equal to their value. It was not until the act of July 18, 1866, 14 Stat. at L., Chap. 481, p. 179, Section 4, now Section 3082 of the Revised Statutes, that a penalty of fine or imprisonment, or both, was imposed for this offense. When Congress came to pass the act of February 27, 1877, 19 Stat. at L., 247, as a part of Section 2865, Revised Statutes (and thus restore Section 19 of the act of August 30, 1842, 5 Stat. at L., p. 565), it was easy for Congress, if it intended to punish acts of irregular importing, to have expressly said so. The word "import" had a well-defined meaning, and if Congress intended to punish "importing with intent to defraud the revenues of the United States," it would have used the word "import" instead of the words "smuggle or clandestinely introduce." It is not to be presumed that Congress would pass a law, in 1877, upon a subject which had been legislated upon in 1866, appeared as a part of the revision of 1874 as Section 3082, and was in full force and effect in 1877, is still in full force and effect, and on which the fatally defective first count of the indictment is predicated. Congress is not presumed to do a vain thing. Even if it be conceded that the Government had the right to seize the diamonds, and forfeit them to the United States, because imported with intent to defraud the revenue, it does not follow that they were smuggled or clandestinely introduced. At most there was an unexecuted intention to smuggle and clandestinely introduce.

The contentions of the learned Assistant Attorney-General can only be sustained by adopting a rule that there are constructive crimes, that a criminal statute may be construed to cover cases not falling within its terms, and that conjecture can be substituted for interpretation. The following, from Lieber's Hermeneutics, 9, is in point:

"The idea, involved in the term interpretation, that we have to discover the true meaning of signs, and represent it to others, implies, likewise, that we proceed in doing so on safe ground, according to rules established by reason, and not arbitrarily or whimsically. On this account, interpretation, and, as will be seen in the sequel, construction, are distinct from conjecture."

In the case at bar, it was impossible to violate the provisions of the act of February 27, 1877, 19 U. S. Stat. at L., 247, amending Section 2865, Rev. Stat., because it is an essential element of that crime, is that the goods must have been such, as to which there was a legal obligation to procure an invoice (this brief, pp. 56–59). If, therefore, there was no legal obligation to have an invoice, then no conviction can be sustained under Section 2865, Rev. Stat., as amended February 27, 1877, 19 Stat. at L., 247. *United States vs. Nolton*, 5 Blatchford, 427 (1867). By Section 4 of the act of June 10, 1890, 26 Stat. at L., 131, no invoice is required where goods are imported which are "personal effects accompanying a passenger." The word "effects" means goods, movables, or personal estate; the word "personal" means pertaining to a person, movables, chattels; the words "personal effects" mean movables, or chattels; the word "accompanying" means going with; the word "passenger" means one who is making a passage. In the case at bar, the diamonds were personal effects; the diamonds accompanied Captain Loesewitz; and Captain Loesewitz was a passenger. Therefore, there being no legal obligation to have an invoice, there could be no violation of the act of February 27, 1877, 19 Stat. at L., 247, *United States vs. Nolton*, 5 Blatchford, 427 (1867). If it be said that Frank Loesewitz was Captain of the steamer Rhynland, and, therefore, does not come within the language of this Section, that argument fails, because he did not cease to be a passenger by being a Captain. To construe the word "passenger" to exclude a person, who, being not only a passenger, but something else, to wit, a captain, would lead to absurd conse-

quences, because such construction would require a Captain, who is as well a passenger, to invoice personal effects, which, when accompanying any other passenger, it would not be necessary to invoice. The words of a statute must be given their ordinary meaning. *Maillard vs. Lawrence*, 16 Howard 251, 261 (1853); *State vs. Peck*, 25 Ohio St., 26 (1874); *Allen vs. Little*, 5 Ohio, 66 (1831); *Lake County vs. Rollias*, 130 U. S., 662, 670 (1889); and when it is attempted to depart from the express intention of a legislative body, and to give words a meaning contrary to their ordinary import, no construction can be given which leads to absurd consequences. *Lau Ow Bew vs. United States*, 144 U. S. 47 (1892); Black on Interp., 104; Wilberforce Statute Law (English Ed., 1881), 112–113; Hardcastle Construction of Statutes (2d English Ed.) 1892, 100–101; Maxwell on Interpretation (3d English Ed., 1896), 277.

There was a total failure of proof that the package, which Captain Loesewitz claims, in his evidence, was given him in the Café Alsacienne, in Antwerp, January 27, 1896, was the package seized by Revenue Officer Gallen. On the contrary, Captain Frank Loesewitz testified (original record, pp. 77–79; printed, p. 34) that he wrote the address, T. Van Reeth, on that package, and put it in the drawer of his state-room on the steamer Rhynland. Revenue Officer Gallen states that the package seized by him had no address upon it, and this is conceded by the learned Assistant Attorney-General (his brief, p. 7).

The *corpus delicti* fails of identification, and without proof of the *corpus delicti* there can be no conviction. Wharton Criminal Evidence (9th Ed.), Section 325.

The second count of the indictment (original record, pp. 3–4; printed, p. 1) alleges that the statute was violated in 1890. A conviction on such a record ought not be allowed to stand.

Second.—An attempt to smuggle or clandestinely introduce is not alleged. If there be a statute which will punish an at-

tempt to smuggle, an attempt has not been alleged. *State vs. Colvin*, 90 N. C., 717 (1884). It is repugnant to charge one with doing an act, and at the same time say that he attempted to do it. For some offenses attempts are made substantive offenses, such as attempts to commit the crime of murder or manslaughter, under Section 5342 of the Revised Statutes of the United States. In some States statutes have been passed, permitting a conviction for an attempt under an indictment for doing the act. But there are no Federal statutes of that kind, and none in reference to the crime of smuggling.

Revised Statutes of the United States, Section 1035, provides that in all criminal cases the defendant may be found guilty of an attempt to commit the crime charged, *provided such attempt be itself a separate offense.* An attempt to smuggle or clandestinely introduce has never been made a separate offense, punishable by fine or imprisonment, or both. The only plausible ground upon which the learned Assistant Attorney-General can urge that it is proper to consider the subject of an attempt is that the proviso to Section 4 of the Anti-moiety Act of June 22, 1874, 18 Stat. at L., 186, contains the word "attempt." We have shown that the definition in the Anti-moiety Act does not apply to the act of February 27, 1897, 19 Stat. at L., 247, amending Sec. 2865, Rev. Stat. Even if it did, an attempt to smuggle is not made a distinct offense within the language of Sec. 1035 of the Rev. Stat.

Third.—If an attempt to smuggle has been properly alleged, the facts do not make out a case of an attempt. If, for the sake of argument, we take the strongest possible view of the testimony of Captain Frank Loesewitz, there was an unexecuted intention to make an attempt to smuggle; or, at most, a preparation, accompanied with an intention, to make an attempt to smuggle. The acts of preparation were, first, an omission of a Consular invoice, which would be one step; putting the diamonds on ship-board in the state-room at Liverpool, which would be the second step; omitting the

diamonds from the manifest, which would be the third step; steaming the vessel from the port of Liverpool into the port of Philadelphia, which would be the fourth step in the preparation; omitting to deliver a manifest containing the diamonds, which would be a fifth step in the preparation. But here the overt acts cease, and all of the overt acts were but preparatory. Nothing further was done, and the goods remained in the state-room on ship board, where they were first placed in Liverpool, until Mr. Gallen, a revenue officer, who made himself known as such, demanded the goods in his official capacity, and they were delivered up to him in that capacity. Merely because there was the crime of failing to get a Consular invoice, or the offense of omitting goods from the manifest, or the offense of failing to deliver a manifest with the goods thereon, and because said acts constituted an unlawful importation under the provisions of Section 3082 of the Revised Statutes of the United States, and merely because in this case there could be no conviction of importing contrary to law, because the first count of the indictment was badly drawn, would not authorize a conviction for an attempt to smuggle, when, by the over-zeal of the Treasury official, no overt act toward landing the diamonds was done. This is well illustrated in 6 Bacon's Abridgment (5th Ed.), 286, as follows:

"*As the offense of smuggling is not complete* unless some goods, wares, or merchandise *are actually brought on shore*, or carried from the shore contrary to law, *a person may be guilty of divers practices*, which have a direct *tendency thereto, without being guilty of the* offense."

There is a wide distinction between an attempt and an intent. There is a wider distinction between acts constituting an attempt and acts constituting preparation. The Anti-Moiety Act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, defines smuggling *for the purposes of that act* in the following language, to wit:

"That *for the purposes of this act* smuggling shall be construed to mean *the act* with intent to defraud of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house, or submitting them to the officers of the revenue, for examination."

Even if we adopt this as a legislative definition of smuggling, and of an attempt to smuggle, the evidence fails to make out a case. The Anti-Moiety Act is the only Federal statute which makes any reference to "*an attempt* to smuggle," and if it be proper to consider the matter of an attempt, we must look to that law.

It appears that *Benedict, J.*, in the case of the *United States vs. Claflin*, 13 Blatchford, 178 (1875), erroneously adopted it as a definition. We have already shown (this brief, p. 80) that at most there was a mere preparation to make an attempt to smuggle without any attempt; an unexecuted intention, and no overt act done beyond the acts of preparation. An attempt is an interrupted act done after the acts of preparation.

The court's special attention was called to this matter by request number five (original record, p. 205; printed, pp. 110–111) in the following language, to wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same, or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime

of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which ruling an exception was taken (original record, p. 208; printed, p. 112), and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

The Court should have given this special instruction, and also granted the request for a binding instruction to find the defendant not guilty; and it was clearly error for the Court to charge the jury, that if they believed the statements made by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing to America, that the jury should find the defendant guilty.

There was no interrupted overt act of bringing in of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no interrupted overt act of an introduction of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no moving of the diamonds from said state-room toward the shore, interrupted before reaching the shore. All preparations had been completed, either to bring them in lawfully by passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the one hand; or, of attempting to pass them from the state-room to the shore without passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the other hand. Anti-moiety act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, Section 4, paragraph 2. No overt act had yet been done, no matter how many acts of preparation or what the secret intention.

If, after the steamer Rhynland arrived, a stroke of light-

ning had sunk the ship, it is clear that up to that time there was no smuggling or an attempt to smuggle, although an offense of omitting to have a Consular invoice, or omitting to put the goods on the manifest, may have been committed (this brief, pp. 67–68).

If, after the ship arrived, Captain Loesewitz had changed his mind and concluded either to pass the same through the custom-house, or submit them to the officers of the revenue, or returned them to Europe, it can hardly be claimed that there was smuggling, or an attempt to smuggle. Or if, after the ship had arrived, an officer of the Government should have demanded an examination, and Captain Loesewitz, knowing the officer to be such, should thereupon submit them to the officer in his official capacity, it is clear that there had been no smuggling, and as yet no overt act of an attempt to smuggle. Or, as in this case, the diamonds were lying in the cabin, just as they had been put at the port of Liverpool, and no move made toward taking them from the state-room ashore, there could not be smuggling or an attempt to smuggle, as there was no overt act toward bringing in or introducing, interrupted while being carried out. On the contrary, upon a revenue officer demanding the diamonds, in his official capacity, the Captain went to the state-room, got the diamonds, and they were submitted to the revenue officer for his examinrtion (original record, p. 66; printed, p. 27). What was done comes within the very language of paragraph 2, section 4, of the Anti-moiety Act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, as to acts which do not constitute smuggling or attempting to smuggle. By the language of the Anti-moiety act, *nonaction* is not an offense, but *an act*. We have already had occasion to comment on this (this brief, p. 77). Nor is it to be forgotten that Captain Frank Loesewitz testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought the package in

the case on trial, and after the vessel had been docked he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock.

These principles have been announced and applied in numerous cases. In the case of *People vs. Murray*, 14 Cal., 159, Mr. Chief Justice Field (at p. 159) laid down the following proposition:

"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

So in the case on trial it is clear that all the means and measures for the commission of the offense were completed, and preparations made, but there was no direct movement toward the commission after the preparations were complete.

The case of *Mulligan vs. People*, 5 Parker's Criminal Reports, 105, decided by the General Term of the Supreme Court of New York in February, 1861 (Clerke, Sutherland, and Allen, Justices), is an interesting one as illustrating the difference between acts of preparation and overt acts of attempt after the acts of preparation. It appears that William Mulligan got into a row in a gambling house. Upon being threatened with eviction, drew and pointed an uncocked Colt's revolver at the officer and threatened to shoot. There was no evidence of an attempt to cock the pistol or to pull the trigger. He was prosecuted under the statute which punished every person who should be convicted of shooting at another, or attempting to discharge any kind of fire-arms, with intent to kill, maim, etc. (page 109). At the close of the evidence the Court was requested to charge the jury that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon. The Court refused the

request, and the ruling of the Court was assigned for error. *Justice Allen*, who delivered the opinion of the Court, said (page 109) that:

"The question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. *The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner.*"

The Court further stated (page 111):

"It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory, and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire-arms. No matter what other offense was committed against the laws, or the person of the officer, if this offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction."

The Court again said (at p. 112):

"An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design (Bouvier's Law Dic.). Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket, and to point it, would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to determine where the line is which separates a preparation to perform a given act from an attempt to perform the act. But the act, which is characterized as an attempt, must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt to discharge it, punishable under the statute. Fire-arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and

made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act, which, carried out and perfected, will result in a discharge."

In the case at bar the question is, whether Mr. Herman Keck, plaintiff in error, has done an overt act by attempting to smuggle in violation of Section 2865 of the Revised Statutes of the United States, and not whether he did or attempted to violate any other provision of law. *Mr. Chief Justice Field* (at p. 159), in *People vs. Murray*, 14 Cal., 159 (1859).

In *Kelly vs. Commonwealth*, 1 Grant Cases (S. C. Pa.), 484, the defendant was indicted for killing in an attempt to commit rape. The evidence disclosed the killing of a man, and no overt act of force toward the commission of a criminal assault upon his daughter. The Court held that the facts did not make a case for an attempt to commit rape, reversed the conviction because "acts are necessary to constitute an attempt; and an attempt to commit a rape is an ineffectual offer by force to have carnal connection."

It is laid down in *State vs. Wilson*, 30 Conn., 500 (1862), that the overt act charged as constituting the attempt must be such as is in itself adapted to produce the effect intended. In the case at bar such overt act would have consisted in after having gone to the state-room on the steamer Rhynland, where the diamonds had been lying ever since put there at Liverpool, moving them with the intention of not passing them through the custom-house or submitting them to the revenue officers for examination, would have constituted an overt act of attempt. But no such overt act was done or attempted to be done, and, therefore, there was no attempt.

It is not claimed that a conviction could be had for an "*attempt* to clandestinely introduce".(this brief, pp. 82-83). And if it were, a case is not made out on the evidence.

IV.

Evidence Erroneously Admitted.

(1) A person sworn as a witness should be permitted to state only facts as to which he was a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declarations made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible.

(1 a) When a sea captain claims that a stranger to him, in Europe, induced him to smuggle diamonds into America, and said sea captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the captain arrested by a revenue officer, and a day after the seizure the captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is inadmissible, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy.

(2) Hearsay evidence is not admissible to corroborate the statements of a witness made upon the stand.

(2 a) A Court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury, that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury, that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing court should correct, although not excepted to, or assigned for error, and makes the incompetent evidence especially prejudicial.

(3) When evidence is being adduced during the progress of a trial, a mere general objection is presumed to be to the admissibility of the evidence and not to the competency of the instrument of evidence. Hence, a general objection on the trial will not be considered by a reviewing court as an objection to the competency of a witness, or that an instrument was not properly authenticated.

(3 a) It is a general rule that the ground of an objection to the admissibility of evidence should be stated. The reason of the rule is, that the Court and counsel might not be misled. When the record discloses that the Court is cognizant of the grounds of the objection, the reason of the abstract rule ceases and the record sufficiently discloses the grounds of the objection, and it is unnecessary to repeat the same, and the reason of the rule ceases of application to the concrete case.

(3 b) The record discloses that a question was objected to and the objection sustained on the ground that the evidence was hearsay. This was followed by a second

question, differing only in verbal expression. This question was similarly objected to without specifically stating the ground of the objection. The Court overruled the objection, and an exception was allowed. In such case it was unnecessary to repeat the ground of the objection, because the Court had stated it, and neither the Court nor counsel were misled. In such case the reason of the abstract rule ceased, and the rule ceased of application to the concrete case.

The Court overruled an objection by Mr. Herman Keck, plaintiff in error, to a question put by the District Attorney to the witness, John C. Gallen (original record, pp. 97–98; printed, p. 46). The error arose as follows:

The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz. (Original record, p. 59; printed, p. 22).

As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a retail jewelry store. Just as witness was leaving, Mr. Hammelrick came in with a person whom the witness identified in Court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish (original record, p. 61; printed, p. 24). While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it be-

longs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati — either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state-room and the paper in a card case in his pocket. Witness wrote a name on the package he received and put it aboard the ship in Europe (original record, p. 78; printed, p. 34); but the package seized had no address on it (original record, p. 94–95; printed, p. 44). When the Rhynland reached the port of Philadelphia, the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'yes.' I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents; and said, 'Captain, that is a package of diamonds you have got, to be sent to Cincinnati,' and if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package; and that, after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck; did not recall his

name; and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck;" and if Mr. Gallen had said "Johnson," witness would not have known the difference (original record, p. 83; printed, p. 37), and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony (original record, p. 83; printed, p. 37):

Q. "You did not identify him by his name at all, did you?"
A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhynland;" was never on the "Rhynland;" and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896 (original record, p. 98; printed, p. 46).

Herman Keck's testimony is a direct and categorical denial of the testimony of Captain Frank Loesewitz (original record, pp. 179–197; printed, 95–107).

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney, and objected to by Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97–98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes, sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114), and has already been set forth in our statement of the case (brief, pp. 7–10).

This ruling raises the question, whether the witness, Mr. John C. Gallen, should have been permitted to detail upon the witness stand declarations made by Captain Frank Loesewitz, one day after the seizure of the diamonds and the arrest of said Captain Loesewitz. It comes within the hearsay rule, and within none of the exceptions thereto. It was proper enough when Captain Loesewitz was upon the witness stand, claiming to be the percipient witness to an alleged transaction in the Café Alsacienne, to give a descripiion of the person with whom he claimed to have had the transaction. It would have been competent for a person knowing Mr. Herman Keck, plaintiff in error, to state from the witness stand Mr. Keck's appearance, as a percipient witness thereto. In the instance first mentioned Mr. Gallen's testimony would be but a repetition of what Captain Loesewitz said to the witness, and the witness Gallen was a mere percipient witness to the conversation, and not to a description of Mr. Keck. The statement by Captain Loesewitz of such description to witness Gallen, and detailed by Mr. Gallen on the witness stand, was hearsay evidence, and a mere self-serving declaration on the part of witness Loesewitz to Gallen. Best's Principles of Evidence (Chamberlayne's Ed., 1883), Section 492, Note (1). Such hearsay is inadmissible, and there is no rule or principle of the law admitting it. Mr. Herman Keck, plaintiff in error, positively denied meeting Captain Frank Loesewitz. It would be a strange rule to allow Captain Loesewitz, after testifying on the witness stand to a description of Mr. Herman Keck, to claim to corroborate that statement as truth by showing by the witness Gallen that he had told the same story to others; especially as the story told by Captain Loesewith, both on and off the stand, was claimed by Mr. Herman

Keck to be a falsehood. If that testimony be admissible, it would have been competent for Mr. Herman Keck, plaintiff in error, to have called a hundred persons to testify that he had stated to them that he did not know Captain Loesewitz, for the purpose of corroborating his testimony upon the witness stand, that he had not met Captain Loesewitz. Nor is the objection removed by the fact that the learned District Attorney put a leading question. This evidence is especially prejudicial, as Captain Loesewitz testified that he did not know Mr. Keck by name; had no recollection of the name "Keck," and if Revenue Officer Gallen had said "Johnson," the witness would not have known the difference; that all the witness knew was the man's face, and that he could not identify him by his name (original record, p. 83; printed, p. 37). A name being but one means of identification, it would have been clearly incompetent to have some one detail from the witness stand a conversation had with Captain Loesewitz one day after the seizure of the diamonds, wherein Captain Loesewitz described Mr. Keck by name; it was equally incompetent to describe him in some other way. *Commonwealth vs. Riker*, 131 Mass., 581–582 (1881); *Rose vs. State*, 13 Ohio Circuit Court Reports, 342, 348–9 (1896); *Lucas vs. United States*, 163 U. S., (1896).

In *Rose vs. State*, 13 Ohio Circuit Court Reports, 342 (1896), defendant, John Rose, was indicted for killing Clara Seigler, May 30, 1895. An exception taken to the admission of certain evidence was duly assigned for error. This assignment of error was sustained, as appears from the following quotation from the opinion of *Burrows, J.* (at pp. 345–349), to wit:

"The whereabouts of the prisoner was shown on the night of the homicide by different witnesses up until a quarter of twelve o'clock, or half past eleven. From that time he is not seen again until morning, unless he was seen by Margaret Maloy.

"As I understand the evidence, shortly after twelve o'clock

she was wakened up by her little girl, who was ill, and wanted some water. She got up for the purpose of going out to the hydrant, on the street. As she went to the yard fence, she saw some one coming, when she retreated into the house. At that time she did not recognize the person who was coming. She nearly closed the door, keeping her foot against it. She says she then recognized the person passing by as being John Rose, the prisoner. After he had passed she went out and obtained the water; and shortly after her return to the room she told her daughter who the man was whom she had seen.

"Her daughter, Annie Maloy, a girl thirteen years of age, is called to the stand. She was permitted to testify that her mother, after she came back into the house, told her who the man was.

"It was important for the State to show, if it could, that at the time Margaret Maloy went to the door, this prisoner was seen coming from the direction of the place of the homicide, and going towards his stable.

"Did she on that night recognize John Rose? She says that she did, and that she told her daughter that night who it was. And to corroborate such statement the daughter is permitted to testify that her mother told her that night who it was.

"* * * * it comes simply to this, that the state was putting in, by the mouth of another, the declaration of Mrs. Maloy, not under oath, to support the statement under oath.

"This evidence, in our opinion, was incompetent, and its admission error."

The very zealous and able District Attorney, who prosecated this action, desired to use this evidence of witness Gallen for the same purpose condemned in the *Rose Case*, as appears from the brief (p. 30) of the learned Assistant Attorney-General:

"The important fact was not that Keck's appearance was so-and-so, but that the Captain had stated it to be so-and-so. It will be remembered that he was unable to remember Keck's name. His ability to describe Keck's appearance was, therefore, of very great weight as confirming the accuracy of his own story."

It was clearly hearsay to permit witness Gallen to detail on the witness stand declarations made to the witness by Captain Loesewitz one day after the seizure of the diamonds and the arrest of Captain Loesewitz, to corroborate Captain Loesewitz's statements made on the witness stand.

In *Commonwealth vs. Ricker*, 131 Mass., 581 (1881), the defendant was indicted for breaking and entering a building at Danvers, Massachusetts, April 11, 1881. On the trial the State called Sergeant of Police Blinn, who testified as follows:

"On the fourth day of said April, Officer Pallock virtually reported to him that he had seen the defendant in the street that night."

This evidence was admitted by the Court "for the purpose of proving the date," over the objection of the defendant. The defendant having been convicted, this ruling of the Court was assigned for error. In sustaining the exception, *Lord, J.*, said (p. 582):

"The date of what? If the 4th of April were a date material to any issue in this case, that materiality does not appear by the bill of exceptions. It is obvious, however, that its materiality consisted, if in anything, in the fact that the defendant was in Salem on that day, and it would be a strange perversion of the rules of evidence to say that incompetent and hearsay evidence of the existence of a fact is admissible in order to fix the date when the facts related in the incompetent and hearsay evidence occurred. *Robinson vs. Litchfield*, 112 Mass., 28. Hearsay evidence is never competent to prove the existence of a fact, except in particular and exceptional instances, having no relation to the question before us. It is the introduction of some fact by the recital of a third person, without the sanction of an oath. This testimony introduces into the case the fact that the defendant was in Salem on April 4th, which fact is supported by no person's oath. References to conversation, or to any transactions *inter alios*, which may be referred to for the fixing of a date, are commonly in the nature of facts which enable the witness to swear affirmatively. In this case, if Officer Pollock had sworn that he saw the defendant in the street at some time, and had made the report at that time to Blinn, and that he had made but one such report, but was wholly unable to fix the date of it, it would have been competent for Blinn to fix the date by a reference to his minutes, or in any other mode to fix the precise time of the transaction, and no rule of law would have been violated. As it now stands, the fact that the defendant was in Salem on that day is in the case without the sanction of an oath."

In *Lucas vs. United States*, 163 U. S., 612 (1896), Lucas was indicted for murder at the Choctaw Nation, in the Indian Country, of Levy Kemp, "a negro, and not an Indian." Cer-

tain evidence was offered and objected to by defendant as hearsay, and the ruling of the Court in admitting it was assigned for error. In sustaining the assignment of error, and holding that the evidence was inadmissible, *Mr. Justice Shiras* said (p. 617), that:

"But we are of opinion that the evidence put in by the government, on this question, was not competent. It consisted of statements alleged to have been made by the deceased, in his lifetime, to le Flore, the witness, that he did not belong to the Indian country, but had come from Arkansas. Such statements do not come within any rule permitting hearsay evidence. The trial judge appears to have regarded the testimony as within the rule that declarations of deceased persons made against their interest are admissible — that as a colored man adopted in the Choctaw Nation gets benefits, rights, and privileges, a declaration made by him against that interest would be competent. It may be that, in a controversy on behalf of a deceased negro's right, or that of his representatives, to participate in the property of the nation, such admissions might be competent. But this case is not within any such rule. The object of the evidence here was not to enforce any rights or claims of the deceased against the Choctaw Nation, but was to sustain an allegation in an indictment, upon which the jurisdiction of the United States Court depended."

A well-recognized exception to the rule against hearsay is, that *while a conspiracy exists*, the declaration of one co-conspirator in furtherance of the common design are admissible against his associates. 2 Wharton Evidence (3d Ed.), Sec. 1205. But a narrative after the conspiracy is terminated, is inadmissible. 2 Wharton Evidence (3d Ed.), Sec. 1206. If there were a conspiracy between Captain Frank Loesewitz and Mr. Herman Keck, that conspiracy had been terminated by the seizure of the diamonds by Revenue Agent Gallen. A full day elapsed after the seizure, and before the declaration offered in evidence, was made.

The rule governing the reversal of cases for the wrongful admission of evidence is admirably stated in the case of *Boston and Albany Railroad Company vs. O'Reilly*, 158 U. S., 334 (1895), by *Mr. Justice Shiras* (at p. 337), as follows:

"If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still, it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an Appellate Court will not disturb a judgment for an immaterial error, *yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting*. *Deery vs. Gray*, 5 Wall, 795, 807; *Gilmer vs. Higley*, 110 U. S., 47."

The same rule is laid down in the case of *Commonwealth vs. Ricker*, 131 Mass., 581, 583 (1881), a case of the wrongful admission of hearsay evidence touching a question of identification upon a certain day. *Lord, J.*, said (at p. 583) that:

"We do not deem it necessary to discuss the question raised at the bar, that this testimony could not have harmed the defendant, because it was wholly immaterial, upon the ground that the offense was charged as having been committed upon the 11th, and this evidence related to the 4th. It must, however, be remembered that the Government insisted upon the introduction of this evidence, notwithstanding the objection of the defendant to its competency, that incompetency *prima facie* is apparent, and it would not be a harsh rule to require of the Government to show affirmatively that incompetent evidence, which it had insisted upon introducing against the objection of the defendant, was harmless.

"We think, however, not only that the bill of exceptions does not show that the evidence was harmless, but it does show that it might have been extremely hurtful. On recurring to the bill of exceptions, there is nothing to show the time when the defendant contended that his absence from the State began. Although it is consistent to suppose it began on the day on the night of which the offense was committed, yet it is equally consistent with the bill of exception to suppose it dated back several months before the commission of the offense, and this latter view explains what is otherwise inexplicable, the persistency with which the Government, against the defendant's objection, claimed the admission of a narrative which was incompetent."

The danger arising from the admission of hearsay evidence is well stated in *Queen vs. Hepburn*, 7 Cranch, 290 (1815), by *Mr. Chief Justice Marshall* (pp. 295–296):

"It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of man. Our lives, our liberty, and

our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.'

"One of these rules is, that hearsay evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony, which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness; its incompetency to satisfy the minds of the existence of the fact, and the fraud which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. . . .

"The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all."

In view of what this learned jurist has said upon the subject of hearsay evidence, it is hardly to be supposed that this Court, will say that this evidence was "not intrinsically unfair, and not such as the rules of evidence were especially intended to bear out." (Supp. brief, *Mr. Asst. Atty.-Gen. Whitney*, p 5)

This error was especially material and prejudicial, because there was oath against oath, and anything, no matter how slight, may have wrongly turned the scales against the defendant.

The Court, having once made its ruling that testimony of this character was competent, it was hardly the province of, or becoming to, an advocate, to keep on objecting every time the District Attorney offered similarly incompetent testimony. An advocate has a duty to perform, and nothing so seriously prejudices a case before a jury as constant unavailable objections and noting exceptions. An objection was made by Mr. Herman Keck, plaintiff in error, the objection overruled, and an exception taken. The Court having opened up this sluice-way, the learned District Attorney poured in upon the case great volumes of similarly incompetent testimony. This evidence is clearly prejudicial, and it does not appear beyond

a doubt that it was not and could not have been prejudical to Mr. Herman Keck, plaintiff in error.

It is hardly an answer for the learned Assistant Attorney-General to say that there was other incompetent evidence introduced and not objected to. An error not objected to does not cure an error duly objected to.

This very incompetent and illegal testimony was the chief reliance of the District Attorney in his argment for corroboration; and it pierced the defendant like a dagger when, after allowing this kind of hearsay evidence to be admitted, and the District Attorney had claimed in his argument that it corroborated the witness, Frank Loesewitz, to charge the jury (original record, p. 209; printed, p. 112), as follows:

"The Government claims, however, that the Captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief can not be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the District Attorney very fully, and I need not further allude to them."

And for the Court to make this incompetent and illegal hearsay doubly prejudicial it had but to add (original record, p. 208; printed, p. 112) that:

"It is sufficient to say in this respect that if the statements made here, under oath, by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here, are true, the defendant is guilty of the offense charged."

If it be said that the part of the charge first here quoted was not excepted to and assigned for error, yet it is that kind of a plain error, vital to the defendant, which this Court always corrects. *Wiborg vs. United States*, 163 U. S., 632, 633 (1896).

That part of the charge, secondly quoted, was duly excepted to (original record, pp. 209–210; printed, p. 113) and assigned for error as number seventeen in the assignment of errors (original record, p. 222; printed, p. 118). The Court reiter-

ated this error in its answer to request number ten for a special instruction (original record, p. 207; printed, p. 112), which answer was duly excepted to (original record, p. 208; printed, p. 112) and assigned for error as number sixteen in the assignment of errors (original record, p. 221; printed, pp. 117–118).

The learned Assistant Attorney General relies on *Insurance Co. vs. Mosley*, 8 Wall., 397, 399, 404 (1869), and case cited at p. 407, and 1 Wharton on Evidence, Sec. 261. These citations, instead of sustaining, destroy the position assumed. In *Insurance Co. vs. Mosley*, a divided court held admissible declarations which pertained to bodily injury, with the caution that the limitations of the doctrine must be carefully observed in its application. *Mr. Justice Swayne* said (at p. 405) that:

"Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. *Anything in the nature of narration must be excluded.*"

In *Eastman vs. R. R. Co.*, 165 Mass., 342, 342 (1896), an offer of evidence to prove what an injured employe said as to how an accident happened, five minutes thereafter, was held to have been properly rejected as hearsay evidence. *Allen, J.*, said (p. 343):

"The statements by the plaintiff were simply a narrative of what had happened, and were not admissible as part of the *res gestæ*."

It was contended by the learned Assistant Attorney General, that it was within the discretion of the court to admit hearsay evidence. The evidence was distinctively inadmissible according to the well known rules of evidence, and it is not within the discretion of the Court to violate those rules.

It was next contended that the objection to this evidence was in bad form. The only object in stating a ground of objection is, to call the attention of the Court to the reason of its claimed inadmissibility. On the same page of the record, the learned trial judge, in sustaining an objection

to the preceding question, stated very fully the reasons of its incompetency, as follows (original record, p. 97; printed, p. 46), to wit:

Q. What took place next day?
A. The next day he called at my office, and I asked him if he had any explanation to make.
(Objected to.)
The Court: His declarations can not be used against the defendant. What this man said when the diamonds were first found upon him might be evidence as part of the *res gestæ*, and it would be safe to admit it, but what he said afterward certainly is not evidence against this defendant.
By the District Attorney:
Q. Did the Captain give you a description of the man who gave the diamonds to him?
(Objected to.)
(Objection overruled.)
(Exception allowed for defendant.)
A. Yes, sir.
Q. What was the day when he gave you the description?
A. The day after I seized the diamonds.

As the Court fully understood the grounds of the objection, it was unnecessary to repeat it upon the face of the record. As a matter of fact, the grounds of the objection were stated, but the Court reversed its ruling as to the preceding question. The learned trial judge, as appears from the face of the record, was not misled, and knew, from his own decision, just made, the ground of the objection; but, on the ingenious argument of the learned District Attorney, reversed his former ruling and held the evidence was competent to corroborate.

As the only purpose of any rule requiring the ground of the objection to be stated is for the information of the Court, the reason of the rule ceases when the record affirmatively shows that the Court is cognizant of the grounds of the objection, and the rule would therefore cease to have application in such a case.

In *Lucas vs. United States*, 163 U. S., 612 (1896), *Mr. Justice Shiras* thus disposed of a contention as to the form of objection to hearsay evidence (p. 617):

"It is contended in this court, on behalf of the Government, that exception to this evidence was not sufficiently taken. The record, however, discloses that the counsel for the defendant, at the trial, objected to the questions put to the witness Le Flore to elicit the statements made by Kemp. It is true that the question had been put and answered before the objection was made, but the defendant's counsel asked that the testimony should be excluded and that an objection should be noted, and thereupon the judge declared the evidence competent. It is, therefore, apparent that the objection was made in time to enable the Government to introduce other and more competent evidence, and that the judge did not overrule the objection becanse it was not taken in time, but because he deemed the evidence competent."

Every objection made at a trial will be included within one of the following:

1. That a witness called is incompetent. In such case the objection must be upon the express ground of the incompetency of the witness, who is the instrument by which the probative facts are conveyed to the court. The reason of the rule is, that the evidence elicited has a logical and juridicial tendency to prove a fact in issue, and is admissible for that purpose, but that the document, by reason of positive rules of law, is incompetent to be the channel of evidence.

2. That a document is incompetent. In such cases the objection must be upon the express ground of the incompetency of the document, which is the instrument by which the protective facts are conveyed to the Court. The reason of the rule is that the matters contained in the document have a logical and juridicial tendency to prove a fact in issue, and are admissible for that purpose, but that the document, by reason of positive rules of law, is incompetent to be the channel of the evidence. Of this character are the cases cited by the Assistant Attorney-General of *Toplitz vs. Hedden*, 146 U. S. 252, 255 (1892), where a paper was read without proof that it was a copy; of *Burton vs. Driggs*, 20 Wall. 125, 135 (1874), of reading from the copy of a deposition; of *Wood vs Weimer*, 104 U. S., 786, 789, 795, of reading from a document not duly attested.

3. That the form of the question is leading. As the Courts hold that putting of leading questions is within the discretion of the Court, the discussion of the form of the objection on this point would be immaterial.

4. That evidence is inadmissible. In such cases, where a Court is not informed of the ground of the objection, it should be stated, as seems to have been held in *United States vs. Shapleigh*, 11 U. S., App. 26, 46, 47 (1893); *Charlestown Co. vs. Joyce*, 8 U. S. App., 309, 311–312 (1893); *Walsh vs. Calslough*, 9 U. S., App. 537, 545 (1893); *Ward vs. Mfg. Co.*, 12 U. S. App., 295, 302–305 (1893).

The reason of the rule is, that the trial judge may not be misled. The reason of the rule ceased in the case at bar, because, as we have shown, the judge out of his own mouth stated the grounds of the objection. And if this Court will go so far as to notice an error, though not even assigned, *Wiborg vs. United States*, 163 U. S. 632, 633 (1896), it is clear that this Court will not overlook an objection duly made, a ruling duly excepted to and duly assigned for error, by an overstrained application of an abstract technical rule, where the reason, object, and purpose of the rule does not apply to the concrete case presented. This is an application of a rule of pure logic, *cessante ratione legis cessat ipsa lex*. Coke on Littleton, 70*b*; Broom's Legal Maxims, 159–163.

V.

Evidence Erroneously Excluded.

(1) In every case the following are pertinent hypotheses: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of the evidence of the witness. It is competent to introduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury.

(1a) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or

thirty minutes; that the conversation was carried on in Flemish by a friend of the captain; that the stranger wrote an address on a piece of paper, and that he said, "by Adams Express" in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying that he (the Captain) wrote the address on the package in Europe, although the package seized had no address on it. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds; could not make use of the diamonds in his business; he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypothesis that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to a pertinent hypothesis, the Court must admit it; its weight is for the jury.

(1 b) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 West Fourth Street, Cincinnati, and handed it to him; that he (the Captain) wrote the address on the package in Europe, although the package seized had no address on it; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia February 11, 1896; was arrested and the diamonds seized. On his arrest, and thereafter, he claimed to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypothesis that the witness, Captain Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said etims, and it ought to have been admitted, and it was error for the Court to exclude it.

We have set forth in our statement of the case (brief, pp. 10–12) two instances of the wrongful exclusion of evidence. They will be presented separately.

First.—The Court sustained an objection to a question

(original record, p. 175; printed, p. 93) put to the witness, Mr. Franz Van Reeth, and the error arose as follows:

There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"
A. "Rough."
Q. "What do you do with the rough?"
(Objected to.)
Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."
(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as number nine in the assignment of errors (original record, pp. 215–216; printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed p. 119). It has already been set forth in our statement of the case (brief, p. 10–11).

This testimony was clearly competent as rendering probable the testimony of Mr. Herman Keck, and improbable the transaction claimed by Captain Frank Loesewitz to have taken place.

The rules of relevancy and their application are shown by the text writers, and in many adjudged cases.

In Thayer's Cases on Evidence, 2, the rule is thus laid down:

"Observe at this point one or two fundamental conceptions. There is one precept to be mentioned, which is not so much a rule of evidence as a pre-supposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system: viz., nothing, which is not supposed to be relevant, *i. e.*, logically probative, shall be received. How are we to know what these things are? Not by any rule of the law. The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known.

"And there is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is largely probative is not, like the former precept, a necessary presupposition in a rational system of evidence; and, accordingly, there are very many exceptions to it. But yet, in order to a clear conception of the law, it is important to notice this also as being a fundamental proposition."

And again (p. 3):

"The law of evidence is the creature of experience, rather than logic, and we can not escape the necessity of tracing that experience. Founded, as being a rational system, upon the laws that govern human thought, and so presupposing and conforming to these, it yet recognizes another influence that must, at every moment, be taken into account; for it is this which has brought it into being, as it is the absence of this which alone accounts for the non-existence of these rules in all other countries, ancient or modern. For, as I have already indicated, the main errand of the law of evidence is to determine, not so much what is admissible in proof, as what is inadmissible. Assuming, as it does, that, in general, what is evidence is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of admissible evidence. Admissibility is determined, first, by relevancy—an affair of logic and not of law; second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter, which is logically probative, is excluded."

The same principle was announced in a controversy involving identity by *Marshall, J.*, in *Bell vs. Brewster*, 44 Ohio St. 690 (1887), in somewhat different language, when he said (at p. 699) that:

"Judicial proof is not a matter of mere arbitrary rule. Its principles are drawn from the experience and observation of men, and should be applied as they are by men in general. Every lawyer and judge of experience will confirm what is said by Mr. Phillips in his work on evidence: 'It may be laid down as a first principle that exclusion is generally an evil and admission generally safe and wise.' To which he adds: 'It is certain the administration of justice in our courts has suffered, not from too free admission of evidence, but from too rigid exclusion.' 2 Phil. Ev. (Edwards Ed.), 628."

In 1 Wharton on Evidence (3d Ed.), Sec. 20, the rule is thus admirably stated:

"Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis, being one which, if sustained, would logically influence the issue. A will, for instance, is contested, and several hypotheses are presented, on any one of which, if proved, the instrument would be invalid. The signature, for instance, may have been forged, or the testator insane, or he may have been fraudulently induced to execute a paper different from that which he had in view. To each of these hypotheses, a series of counter hypotheses is conceivable. If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery; to meet this hypothesis, it is admissible for plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money. If the hypothesis set up for the defense is fraud, then all facts which are conditions of fraud are relevant. Or, to take another illustration: A prairie is fired, it is said, by a passing locomotive; the hypothesis of the plaintiff is that the firing was by negligence, and for the plaintiff all the conditions of negligence are relevant. The defense sets up *casus*, or contributory negligence; and then, on the part of the defense, it is relevant to prove the conditions of either of the latter hypotheses."

And again (at Section 21):

"Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less *improbable*."

The learned writer illustrates his main proposition (in Sec-

tion 23) as to pertinent hypothesis as to proof of the author of Junius; and (in Section 24) as to identify in the famous Tichborne case.

Sir James Fitzjames Stephen, in his Digest of the Law of Evidence, Part 1, Chapter 2, Article 7, lays down the following rule:

"When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say:

"Any fact which supplies *a motive* for such an act, or which constitutes preparation for it."

He illustrates this rule as follows:

"The question is, whether A. murdered B. The facts that, at the instigation of A., B. murdered C twenty-five years before B.'s murder, and that A. at or before that time used expressions showing malice against C. are deemed to be relevant as showing *a motive* on A.'s part to murder B."

The author quotes *R. vs. Clewes*, 4 C. & P. 221. The American editor (Mr. William Reynolds) cites *McKee vs. People*, 36 N. Y., 113; *Kolb vs. Whiteley*, 3 G. & J. 188, 195; *Garber vs. State*, 4 Caldw. (Tenn.), 161, 165.

In Wharton on Criminal Evidence (9th Ed.), Section 17, the rule is thus stated:

"Suppose the question to be, *whether it is more probable* that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, *there is simply a balance of improbabilities* in weighing, which the mind must incline, if it incline at all, to the acquittal of the darker crime."

And again (Section 18):

"Perjury, indeed, is never to be presumed; but we can not shut our eyes to the fact that convictions have sometimes been based on perjured testimony; and, though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain that there is no perjury in the testimony brought before us in any given case. It is true that *there may be forgery of facts as well as falsification by witnesses:* and it is true, also, that with the exception of such objects as

can be brought into court on trial, the adjudicating tribunal must become cognizant of indicatory facts through witnesses who may be as much tempted to perjure themselves in giving this kind of testimony as in giving other kinds of testimony. But it can not be denied that perjury, in respect to that of which a witness says he was the only observer, is more easy than perjury in respect to extrinsic facts open to common observation, and *a forti ori* more easy than the forgery of such facts. Perjury of the first-class is skillful in eluding detection; is self-contained and self-verifying; it can be consummated without observation and without machinery; it is thus easily concocted and not easily exposed. On the other hand, extrinsic facts can not be forged without attracting more or less attention, nor testified to without that possibility of exposure inherent in all fabrications of matters extrinsic. False direct testimony, also, hangs ordinarily on a single link, and if that link is sufficiently strong the case succeeds. But it is of the essence of what is called circumstantial evidence; *i. e.*, evidence dependent on the collection of numerous self-supporting facts—that if one of these facts should turn out to be forged, the taint affects the whole system. *The probability of detection of falsification is, therefore, in proportion to the number of issues presented.*"

And again (Section 21):

"The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypotheses; and in criminal issues, if there be no probable hypothesis of guilt, consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted. But this is not the only use of hypothesis. *It is only by appealing to hypothesis that questions of relevancy * * * can be determined. * * * Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.*"

And again (Section 23):

"*Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue.* A person is found dead, for instance, with marks of violence on his body, and at once a series of hypotheses are tried in turn, as keys to a lock, to see if they will disclose the secret of the death. Were the wounds homicidal or suicidal? * * * If a person is on trial for the homicide, then against him are admissible all facts that sustain any hypothesis which implies his guilt. When it is his turn to develop his defense, then any facts are admissible that would sustain the hypothesis of his innocence."

And again (Section 24):

"Relevancy is therefore to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts that go either to sustain or impeach a hypothesis logically pertinent are admissible. But no fact is relevant which does not make more or less *probable* such a hypothesis."

These rules have been applied in numerous cases.

In *Wiggins vs. People, etc., in Utah*, 93 U. S., 465 (1876), the facts were as follows: Mr. Wiggins was indicted for killing John Kramer (p. 466); Dobson, called by the State, was the only percipient witness (excepting the defendant Wiggins) to the killing (p. 467); Dobson was unable to tell who fired the first shot; Wiggins was convicted. On his trial he offered to prove by witness Heslop (p. 466) that prior to and on the night of the killing, the deceased, John Kramer, made a threat that he would kill the defendant, Wiggins, before he went to bed. Defendant Wiggins could not and did not attempt to show that the threat had been communicated to him. On the objection of the District Attorney, the Court excluded this evidence, and an exception was taken. Mr. Wiggins prosecuted error and the Supreme Court of the United States held that the evidence was competent, ought to have been admitted, that the trial court erred in excluding it, and set aside the conviction and reversed the judgment.

Mr. Justice Miller, who delivered the opinion of the Court, said (p. 470) that:

"Now, when, under all these circumstances, the witness, and the only witness who was present at the encounter, swears that he can not tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent that if the person to whom the deceased exhibited that pistol a few minutes before the shooting had been permitted to tell the jury that deceased then said, 'he would kill defendant before he went to bed that night,' it would have tended strongly to show where the first shot came from, and how that pistol with one chamber emptied came to be found on the ground. *This testimony might*, in a state of mind produced on the jury by the other evidence we have considered, *have turned the scale in favor of defendant*. At all events, we are of opinion that in that condition of things it

was relevant to the issue and should have been admitted. Judgment reversed, with directions to set aside the verdict and grant a new trial."

In *Nickerson vs. Spindell*, 164 Mass. 232 (1895), the plaintiff sued for service and money paid. The defendant contended that the services were rendered and money paid gratuitously without intention of compensation and repayment. The Court held that it was competent to show that plaintiff was then engaged in other business, at which he was earning from three to ten dollars a day as rendering *probable* plaintiff's case, and rendering *improbable* defendant's claim.

In *Buswell Trimmer Co. vs. Case*, 144 Mass., 350 (1887), the evidence was directly contrary. On the one side it was testified that the sale was conditional whereby the machine sold was to remain the vender's property. On the other side it was testified that the sale was absolute with a four months' credit. The Court held that it was competent to show the purchaser's financial inability, as rendering *probable* the vender's claim, and *improbable* the purchaser's claim.

In *Parker vs. Coburn*, 10 Allen, 82 (1865), *Mr. Justice Gray* said (at p. 84–85), that:

"The defendant in his answer put in issue the making of the contract alleged by the plaintiff, and averred that the testator never agreed to pay more than $1,500 for the land; that sum was the consideration named in the deed to him from the plaintiff. The testimony of one of plaintiff's witnesses tended to show that the half of the farm was not worth $2,000, without the wood, and that there was $1,000 worth of wood standing on the whole farm, or $500 to each undivided half. The deeds offered in evidence by the defendant showed that the plaintiff had some years before conveyed to his father the right to cut the wood, and were material evidence upon the question, *what price he agreed* to pay for the land. *Bradbury vs. Dwight*, 3 Met., 31. Those deeds having been excluded by the presiding judge, the defendant is entitled to a new trial."

In *Norris vs. Spofford*, 127 Mass., 85 (1879), the materiality of the evidence offered fully appears from the opinion of *Soule, J.*, as follows:

"The parties agree that a contract was made between them, by which the plaintiff was to sell his horse and diamonds to the defendant. The controversy is as to the consideration for that sale. The plaintiff introduced evidence tending to prove that he was to receive in payment a horse called Little Ned, and that the defendant fraudulently delivered to him a horse of much less value. The defendant, admitting that he delivered the less valuable horse, contends that the bargain was for that horse, and not for Little Ned, and introduced evidence tending to prove this. The evidence being conflicting as to what the contract was, it was competent for the defendant to show that the value of the property which he was to receive, and did not receive, in accordance with the bargain made, was, and was known to the parties to be, far less than the value of Little Ned. This fact, if proved, would have a tendency to show that *probably* the contract was not for the sale of the more valuable horse to the plaintiff, but for the sale of the horse which he actually received; and so, that the plaintiff has no cause of action. *Bradbury vs. Dwight*, 3 Met., 31; *Lee vs. Wheeler*, 11 Gray, 236; *Rennell vs. Kimball*, 5 Allen, 356; *Parker vs. Coburn*, 10 Allen, 82; *Upton vs. Winchester*, 106 Mass., 330; *Brewer vs. Housatonic Railroad*, 107 Mass., 277. The learned judge who tried the case in the Superior Court erred, therefore, in rejecting the evidence offered by the defendant on this point."

Upton vs. Winchester, 106 Mass., 330 (1871) was an action on a contract. The question arose on the exclusion of evidence. *Martin, J.* (pp. 330–331), thus disposes of the question:

"The plaintiff's evidence tended to prove that the defendants purchased of them a quantity of planks lying in two ranges in the plaintiff's mill-yard, consisting almost entirely of oak, but containing a little ash; and that the defendants, knowing that a part of it was not oak, agreed to pay $23 per thousand feet for the planks in the two ranges, according to a survey which had been made. The defendants denied this, and their evidence tended to prove that they entered into negotiations with the plaintiff for the purchase of the oak planks contained in the two ranges, but that no contract of purchase was ever completed, and that they never bought any of the planks, and never talked of buying any of it, except the oak.

"In this state of the evidence, the defendants offered to prove that the said two ranges of planks embraced maple and beech, besides oak and ash, and the number of feet of each kind, and they also offered evidence to show the market value of oak plank at the date and place of the alleged contract;

but the court rejected the evidence. We are of opinion that this evidence should have been admitted.

"If this contract was conceded to be as claimed by the plantiff, this evidence would be inadmissible: but the issue between the parties was whether the defendants had made such a contract. Upon this issue it was competent for either party to show what was the contents of the two ranges. If they contained a large proportion of plank of small value, like maple or locust, the inference fairly to be drawn might be that the defendants had not made the contract as alleged. It would show an *improbability* in the plaintiff's claim. For the same reason, the evidence to show the market value of oak plank was competent. If it was $23 per thousand feet, or less, it would tend to show a *probability* that the contract was not as claimed by the plaintiff. Either fact offered to be proved by the defendants might reasonably have an influence on the minds of the jurors, and aid them in deciding the issue. *Bradbury vs. Dwight*, 3 Met., 31; *Lee vs. Wheeler*, 11 Gray, 236."

In *Allison vs. Horning*, 22 Ohio St., 138 (1871), the Court admitted evidence of the value of work at the time a contract was made therefor, as tending to show what the *agreed* price was, where the testimony was conflicting as to the agreed price. Judge Day, who delivered the opinion of the Court, said (at p. 142) that:

"The only point of difference between the parties was the *price* for which it was *agreed* the work should be done. The evidence was admitted for no other purpose than to enable the jury to decide which of the prices claimed by the respective parties was the true price agreed upon. * * * * It was of some value as tending to show the *improbability* of the claim of the defendant."

In *Tompkins vs. Starr*, 41 Ohio St., 305 (1884), the syllabus is as follows:

"Where T. claimed and had offered evidence to show that S., her brother, had agreed to furnish her a home as long as she lived, if she would act as his housekeeper, and S. claimed that by the arrangement between them T. was to be his housekeeper only so long as they could agree, or as long as they should get along together. *Held:* That it was competent for S. as tending to support his claim to prove that T. was a person of peevish, nervous, and disagreeable temper, and that none of her relatives who had tried to live with her could do so; and that these facts were known to S. when the arrangement to live together was made."

Judge McCauley, who delivered the opinion of the Court, said (p. 306) that:

"If the plaintiff was of such peevish and disagreeable temper that none of her relatives could live with her, and this was known to the defendant when the arrangement to keep house was made, these facts would strengthen the *probability* that the arrangement was temporary, as claimed by the defendant, rather than for life, as claimed by the plaintiff."

In *Dyer vs. Isham*, 4 Ohio Circuit Court Reports, 429 (1890), a debt had been discharged by bankruptcy proceedings. The plaintiff testified that after the bar defendant had acknowledged and promised to pay the debt, the defendant on the witness stand denied making such promise. The plaintiff thereupon attempted to prove that at the time of making the alleged promise the defendant was worth $25,000 over and above his liabilities *as rendering probable* the testimony of the plaintiff that the defendant had promise to pay the debt after the bar. The trial court excluded the evidence, and this was assigned for error. The Circuit Court reversed the judgment, holding the testimony competent for the purposes for which it was offered. The opinion was delivered by Judge James M. Smith, who is regarded by the bench and bar of Ohio as one of the ablest members of her judiciary. He said (pp. 433-434) that:

"We are of the opinion that evidence of the financial condition of Mr. Isham at the time in question was relevant—that the legitimate tendency of it, in connection with the other facts proved in the case, would have been to show *that the proposition as to the promise which was in issue was more or less probable.* It would seem to us that a man in independent circumstances, or of large means, whose friend had paid debts for him, from which he was legally discharged, but which he had declared should be paid in full, would be much more likely to bind himself by a promise to pay them, than if he were in reduced circumstances, and had barely sufficient to maintain himself or family. Of course, such evidence of itself would be of little weight, for we recognize the fact that a man of great wealth, while admitting the justice of such claims upon him, might have declined under the circumstances named to bind himself to the payment of these barred debts.

But we think the experience of men has shown that it is more probable that a man of ample means should do this, than one who was not financially able to do so.

"But whether this be so or not, if such evidence would have had the tendency to make the fact as to the promise having been made more or less improbable, still it should have gone to the jury. The safer and more satisfactory rule is for the judge to admit whatever is relevant, and leave the question of its weight for the jury."

In *Holman vs. Raynesford*, 44 Pacific Reporter (Kansas), 910, (1896), the Court held it relevant to show the circumstances surrounding the transaction in controversy, the relations of the parties to each other and to the transaction, for the purpose of aiding the jury in judging of the reasonableness of the respective claims of the parties, who testified directly contradictory to each other.

In the case on trial, the admitted evidence discloses that Captain Frank Loesewitz and Mr. Herman Keck were strangers; that he did not know Mr. Keck's name, but remembered his face; that Mr. Herman Keck was President of The Coetermans-Henricks-Keck Diamond Cutting Company, of Cincinnati, which company was engaged in cutting diamonds; that Mr. Herman Keck was a gentleman of large means, whose high character, reputation, and integrity was sustained by six of the leading business men of the City of Cincinnati, including its Mayor (original record, pp. 154–160; printed, pp. 80–83). The witness, Captain Frank Loesewitz, testified that he had never seen Mr. Keck but once in his life, then for about fifteen to thirty minutes, in going from the residence of Mr. Van Hammelrick to the Café Alsacienne, drinking a glass of beer, Mr. Van Hammelrick handing Captain Loesewitz a package of diamonds, and walking a half square on the Place Verte; that the only words positively testified as having been spoken by Mr. Herman Keck, were "by Adams Express;" that he (Loesewitz) wrote the address "T. Van Reeth" on it himself; that the package seized had no address on it. Mr. Herman Keck, plaintiff in error, posi-

tively and categorically denied the alleged meeting and transaction. Under the rules laid down, and the circumstances stated, it can not be disputed that the evidence offered in behalf of Mr. Herman Keck, that he and his company dealt wholly in rough diamonds, could not use cut diamonds, never carried diamonds of the character alleged to have been smuggled, had no motive to smuggle, were relevant as rendering probable the testimony of Mr. Herman Keck and improbable that of Captain Frank Loesewitz as to the transaction alleged to have taken place in the Café Alsacienne and upon the Place Verte and the claimed identification of Mr. Keck.

We do not contend that a man without motive may not smuggle, but we do contend that the evidence offered had a tendency to show the *probability* of the testimony of Mr. Herman Keck and the *improbability* of this testimony of Captain Frank Loesewitz, especially as they directly contradicted each other as to the alleged main transaction. A court has no discretion to exclude legal evidence merely because the trial judge does not attach much weight to it, as its weight is for the jury. *Bradbury vs. Dwight*, 3 Met., 31, 34 (1841.) Taken in its entirety, the testimony offered in the trial was the most important evidence that Mr. Keck had to offer If the court had admitted the evidence, as it should have done, it would have turned the scales, and have been, at least, sufficient to raise a reasonable doubt, to the benefit of which the defendant was entitled. *Mr. Justice Miller* (at p. 470), in *Wiggins vs. People, etc., in Utah*, 93 U. S., 465 (1876).

The argument against the admission of this evidence goes to the weight, and not its admissibility. In *Bradbury vs. Dwight*, 3 Met., 31 (1841), parol evidence was introduced to prove the contents of a lost instrument. The testimony of plaintiff and defendant was contradictory as to its contents. The defendant offered to prove the value of the article mentioned in the contract to show the probability of his story. The trial judge rejected it, and in reversing the judgment, Putnam, J., answered a similar argument as follows:

"Suppose the evidence would have proved that the wood was worth two dollars a cord; a sale for the price at which the plaintiff alleges that it was rated, would be contrary to the uniform course and conduct of men. The rejected evidence would, indeed, only raise a presumption, which might be rebutted by some particular circumstances that might have operated upon the defendant to sell for less than the known value. But this would not affect the *admissibility* of the evidence. The fact should be submitted to the jury, to be properly weighed by them. And if it were established, and not explained or rebutted, it would certainly have a tendency to disprove the allegation of the plaintiff, that the contract was for a price per cord greatly less than the common value."

It is next contended by the learned Assistant Attorney-General that the admission of this evidence was wholly within the discretion of the Court, because it was circumstantial evidence. According to this argument, no evidence is admissible under positive rules of law, except that of a percipient witness to the facts which make up the issue. Such a rule would exclude evidence admissible under positive rules of law, such as reputation in a criminal case, etc. By the simplest induction from the cases and other authorities cited, the rule is plain that where two witnesses directly contradict each other, any evidence is admissible which tends to render probable or improbable the facts detailed by them, and for error in the exclusion of such evidence the reviewing Court reversed the judgments in *Wiggins vs. People, etc., in Utah*, 93 U. S., 465, 470 (1876); *Parker vs. Coburn*, 10 Allen, 82 (1865); *Norris vs. Spofford*, 127 Mass., 85 (1879); *Upton vs. Winchester*, 106 Mass., 330 (1871); *Bradbury vs. Dwight*, 3 Met., 31, 34 (1841); *Tompkins vs. Starr*, 41 Ohio St., 305 (1884); and *Dyer vs. Isham*, 4 Ohio Circuit Court Reports, 429, 433-434 (1890).

The learned Assistant Attorney-General relies on *Goldsby vs. United States*, 160 U. S., 70, 73; *Thiede vs. Utah*, 159 U. S., 510, 518; *Moore vs. United States*, 150 U. S., 57; and *Alexander vs. United States*, 138 U. S., 353. The *Goldsby Case* simply held that the order of proof was in the discretion of the trial judge; the *Thiede Case* that the order in which testimony

shall be admitted is within the discretion of the trial court; the *Moore Case* the court held evidence as to motive competent; and in the *Alexander Case* the court declined to rule whether it was error to exclude a declaration as part of the *res gestae*, and none of them support the contention of the learned Assistant Attorney-General. On the contrary, in the *Moore Case* referred to, *Mr. Justice Brown* (at p. 60–61) quoted with approval the remarks of *Mr. Justice Clifford* in *Castle vs. Bullard*, 23 Howard, 172, 187, that:

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the injury or the failure of direct proof, *objections to testimony on the grounds of irrelevancy are not favored*, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other."

Second.—The court sustained an objection to a question (original record, p. 161; printed, p. 84) put to the witness, Mr. Constant Van Reeth, and the error arose as follows:

The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25); that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth; may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect (original record, p. 85; printed, p. 39). The piece of paper upon which Captain Loesewitz testified the stranger had written the name, Van Reeth, was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time, March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to

by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had, that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214–215; printed, page 115).

The testimony was material, because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he had known Captain Loesewitz for twelve years (original record, p. 174; printed, p. 92).

This assignment of error presents another question under the rules of relevancy. The prosecuting witness, Captain Frank Loesewitz, had been indicted three months before the finding of the indictment against Mr. Herman Keck, and for the same offenses charged against Mr. Herman Keck, and expected to better his condition by testifying against Mr. Keck (original record, p. 90; printed, p. 42). He has never to this day been put on trial. Although arrested February 11, 1896, and claiming to have given up the diamonds, and to have fully disclosed his relations thereto

within a few days after his arrest, he did not disclose to anybody the claimed existence of or produce the paper containing the name Van Reeth until the hearing of Mr. Keck before the United States Commissioner, March 18th, 1896, although claiming to have carried the paper in his pocket since the claimed meeting in the Café Alsacienne, January 27, 1896. The learned Assistant Attorney-General is plainly in error as to dates. That the paper was spurious was evidenced by the long delay in producing it, the discrepancy between the letter T and the name Franz; the absence of evidence as to handwriting; that Mr. Franz Van Reeth testified that he had known Captain Loesewitz twelve years; that Captain Loesewitz admitted that he might have known the name F. Van Reeth and might have seen Mr. Van Reeth's picture in a paper; that he himself (Loesewitz) wrote the address on the package in Europe (original record, p. 66; printed, p. 27), and the evidence of witness Gallen that the package seized had no address on it (original record, p. 95; printed, p. 44). It was therefore competent to prove that in the newspapers read by Captain Loesewitz, Mr. Van Reeth's name and picture frequently appeared, accompanied by the statement that Mr. F. Van Reeth had gone to Cincinnati to engage in the diamond business (original record, p. 161; printed, p. 84). This was especially important in view of the fact that the witness, Captain Loesewitz, did not know Mr. Keck by name (original record, p. 83; printed, p. 37), and that Captain Frank Loesewitz had ample opportunity and time during his trip to Europe between the date of his arrest, February 11, 1896, and the hearing of Mr. Keck before the United States Commissioner, March 18, 1896, to manufacture this evidence, because it was on March 18, 1896, he, for the first time, identified Mr. Keck. It is a fair hypothesis to say that Captain Frank Loesewitz may have manufactured this spurious paper, and the evidence offered tended to render *improbable* the evidence that Mr. Keck had given him the paper in the Café Alsacienne.

VI.

Charge of Court to Jury — Part Excepted to.

(1) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court.

(2) A charge of a Court to a jury should cover the whole case, and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt.

(2a) The defendant was charged with importing contrary to law and with smuggling diamonds. A sea captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (a) that a friend, in the presence of the defendant, gave him the diamonds; (b) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (c) that he wrote an address on the package; (d) that he had been in the habit of bringing over similar small packages and always reporting to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses or all of the testimony of one witness, and withdraw from the jury certain hypotheses material to the questions of guilt.

The story told by Captain Frank Loesewitz on the witness stand has been heretofore given in substance (this brief, pp. 61–64). In reference to the same, the Court charged the jury as follows (original record, p. 208; printed, p. 112), to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there

duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

The portions of the charge of the Court excepted to, were erroneous for five reasons, to wit:

First.— The first count of the indictment was duly demurred to as being insufficient in substance (this brief, pp. 23–26). Being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S. 268 (1895).

Second.— The second count of the indictment was duly demurred to as being fatally defective, insufficient in substance, and because it stated no crime (this brief, pp. 26–59). Being thus fatally defective, insufficient in substance, and stating no crime, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895).

Third.—The third count of the indictment was attempted to have been drawn under Section 3082 of the Revised Statutes of the United States, in that there was a violation of Section 2802 of the Revised Statutes of the United States. This was duly demurred to, and the demurrer should have been sustained. But as the Court instructed the jury to return a verdict of not guilty thereon (original record, p. 206; printed, p. 111), it has been taken out of the discussion.

Fourth.—The evidence was clearly insufficient to sustain the second count of the indictment (this brief, pp. 59–82). The Court told the jury that if they believed the story of Captain Loesewitz they must find the defendant guilty. If the story of Captain Loesewitz were true, the facts detailed by him do not constitute an offense under the Act of February 27, 1877, 19 Stat. at L., 247, amending Section 2865, Rev.

Stat., under which the second count of the indictment was drawn (this brief, p. 75).

Fifth.—The charge of the Court is erroneous, because it did not cover the whole case. It should have put certain hypotheses to the jury, which, if they found established, from all the evidence, beyond a reasonable doubt, to find the defendant guilty, and not two isolated occurrences forming but a part of the testimony of one witness. 2 Thompson on Trials, Sections 2328 and 2421.

The correct rule in charging juries is thus stated in 2 Thompson on Trials, Section 2328, to wit:

"Instructions should cover the whole case, and should not be so framed as to single out isolated portions of the evidence not in themselves decisive. * * * * But the error of singling out isolated facts, not in themselves decisive of the merits of the controversy, and instructing the jury that if they believe such facts they will find for one party or the other, is not regarded as non-direction, but as mis-direction, and an invasion of the province of the jury. It is a frequent and pernicious error, for which judgments are constantly reversed. * * * * On the trial of an indictment for an assault with intent to murder, the law presumes the defendant innocent of the felony, unless the whole evidence satisfies the jury that he made the assault with the particular intent alleged in the indictment. In such a case it is error for the Court, in charging the jury, to select from the mass of the evidence a portion only of the facts disclosed by it, and to declare that if such facts are proved, the law presumes that the act was malicious, and that the defendant intended to kill. Such a charge takes away from the defendant the presumption of innocence upon the selected facts only; whereas, according to law, that presumption can not be taken away except by a conviction of his guilt produced on the minds of the jury by the whole evidence."

This rule has been applied in, among other cases, *Stevenson vs. United States*, 162 U. S., 313 (1896); *Brown vs. United States*, 159 U. S., 100 (1895); *Mills vs. United States*, 164 U. S., 644 (1897); *Clement vs. Packer*, 125 U. S., 309 (1887); *Inland & S. Coasting Co. vs. Tolson*, 139 U. S., 551, 557 (1891); *Adams vs. Roberts*, 2 Howard, 486, 496 (1844); *Jewell vs. Jewell*, 1 Howard, 219, 233 (1843); *Greenleaf vs. Birth*, 9 Peters, 292 (1838).

In *Clement vs. Parker*, 125 U. S., 309 (1887), while the trial court did not positively and imperatively direct the jury to find for the plaintiff, it was, in its logical effect, a syllogysm; its major premises was a general rule as to the effect of the absence of certain evidence and its minor premises that there was not said certain evidence (p. 327). The conclusion was easy, that *upon the evidence singled out*, to find for the plaintiff. Mr. Justice Lamar, who delivered the opinion of the Court reversing the judgment, said (p. 327) that:

"The direct tendency, if not the avowed purpose, of the statements contained in this charge, is to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defense."

In *Ott vs. Oyer's Executors*, 106 Pa. St., 6 (1884), the Court, among other things, charged the jury (18) that:

"If, then, you are satisfied from the testimony of Phillips and Ott that when this note was given by William Ott to John Oyer," etc.

There had also been introduced the evidence of a witness named Bogardus.

The Court, in reversing the judgment because of this instruction, said:

"All the evidence tending to establish the facts in issue was for consideration of the jury, and in so far as the Court excluded it, there was error."

In the case on trial the Court practically excluded the testimony of all the witnesses except that of Captain Frank Loesewitz, and even limited his to two particulars. It excluded from the consideration of the jury the evidence of Revenue Officer Gallen, that the package seized had no address upon it (original record, p. 495; printed, p. 44).

In *Brown vs. The United States*, 159 U. S., 100 (1895), Brown was indicted for killing Josiah Poorboy. There was conflict in the evidence as to what occurred when the shooting took place, but it appears with reasonable certainty that Brown shot and killed either Whitehead or Poorboy (p. 102). The defendant requested the Court to instruct the jury, that if the

defendant believed the persons attempting his arrest were not officers, and the killing was done in resisting the arrest, the crime would be manslaughter, but not murder. The Court gave the instruction with the following modification (p. 102), to wit:

"Unless such killing was done *in such a way* as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

Mr. Justice Harlan, in delivering the opinion of the Court, said (p. 103) that:

"The jury might well have inferred, from the instruction, as modified, that they were at liberty to return a verdict of murder because alone of the *way* or *mode* in which the killing was done, even if they believed that, apart from the way in which the life of the deceased was taken, the facts made a case of manslaughter, not of murder. We do not think that a verdict of guilty of manslaughter or murder should have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been whether, at the moment the defendant shot, there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder."

In *Stevenson vs. United States*, 162 U. S., 313 (1896), John Stevenson was convicted of killing Joe Gaines. The court refused to submit to the jury a special charge upon manslaughter, and refused to submit that issue to the jury. In reversing the judgment, Mr. Justice Peckham said (314–315):

"The question is whether the court erred in refusing this request. The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder. It is difficult to think that a case of killing by shooting, where both men were armed, and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer, whether the killing was murder or manslaughter, or a pure act of self-defense. The evidence might

appear to the court to be simply overwhelming to show that the killing was in fact murder and not manslaughter, or an act performed in self-defense; and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and can not be matter of law for the decision of court . . . The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self-defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact; viz., whether under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self-defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self-defense; and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the defendant."

And again (pp. 321–322):

"Is it perfectly plain and clear, *as a conclusion of law*, that shooting another under circumstances such as were detailed by some of the witnesses in this case can have no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent act of that malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury. Whether the witness told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury."

And again (p. 323):

"A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter."

In this portion of the judge's charge excepted to, the court limited the inquiry to the testimony of Captain Loesewitz "*respecting his receipt of the package and bringing it here.*" The court left to the jury no alternative but to find defendant guilty if they believed the Captain's testimony in these two particulars. It did not leave the jury all the evidence in the case, or even all of the evidence of Captain Loesewitz, but singled out two parts of the testimony of the Captain Loesewitz. This was to withdraw from the jury all the testimony of all the witnesses except two parts of the testimony of Captain Loesewitz.

Under this charge of the court to the jury the inquiry becomes pertinent, *Which testimony?* The testimony of Captain Loesewitz was inconsistent with itself in important particulars. One story might be consistent with the theory of turpitude and the other with innocence. By the charge of the court it would then become immaterial which of the stories the jury should believe, either the one involving turpitude or the one consistent with innocence, because in either case the jury was bound to find the defendant guilty. Captain Loesewitz swore positively that he had been in the habit of bringing over similar small packages in the same way that he brought over the package seized by Revenue Officer Gallen; and that, after the vessel had been docked, he would go to a custom officer on the dock and report the fact; but that in this case he had no time to go on the dock, as the Treasury agents came aboard before he had an opportunity to go upon the dock (original record, pp. 81–82; printed, pp. 36–37). He further positively testified that the package claimed to have been given to him by Mr. Van Hammelrick, in Antwerp, had upon it an address which he wrote thereon himself (original record, p. 78; printed, p. 34; heretofore set out in this brief, pp. 62–63). The package seized by the revenue officer had no address upon it, as testified to by Revenue Officer Gallen (original record, p. 95; printed, p. 44). The

following is a quotation from Revenue Officer Gallen's testimony:

Q. "Look at that box and tell me whether that is the box?"

A. "Yes, sir, that is the box which I seized."

Q. "Was the box in that condition, with the exception of the tearing of the paper?"

A. "With the exception of the tearing of the paper. That paper was around the box, and then there was another seal right in the corner."

Q. "It was torn off in the tearing of the paper?"

A. "Yes, sir."

Q. "Was there any address whatever upon the box?"

A. "*No address on the box whatever.*"

This is conceded by the learned Assistant Attorney-General. (*Mr. Whitney's brief*, p. 7.)

It is a reasonable hypothesis that the package seized by Revenue Officer Gallen was one of the packages, Captain Loesewitz testified, he had been in the habit of bringing over. (Original record, pp. 81–82; printed, pp. 36–37.)

The only mark of identification known to Captain Loesewitz was the address written by himself. No such box was seized; and it was at least a question for the jury to say whether the box on which he claimed to have put an address was the box which was seized, and upon which there was no address.

The plaintiff in error, Mr. Herman Keck, was presumed to be innocent until proven to be guilty beyond a reasonable doubt, and he was entitled to the benefit of any reasonable doubt arising from *all* the evidence. If there were any reasonable hypothesis consistent with his innocence or inconsistent with his guilt, he should have been acquitted. The case turned on the claimed ability of the witness, Captain Frank Loesewitz, to identify Mr. Herman Keck, a stranger whose name he did not know, whom he had seen for less than half an hour, during which a conversation was carried on in Flemish between Captain Loesewitz and Mr. Van Hammelrick.

There was no evidence that the diamonds were manufactured or purchased at Antwerp, and no Consular invoice was necessary. (Act June 10, 1890, 26 U. S. Statutes at Large, 131, Section 3). These diamonds were personal effects accompanying Captain Frank Loesewitz, a passenger on his own vessel. (Same Act, Section 4.) The defendant was entitled to the benefit of the usual custom of the Captain in such matters, to show that there was no intention not to submit them to the officer of the revenue for examination. (Antimoiety Act, June 22, 1874, 18 U. S. Statutes at Large, 186, Section 4.) This was a pertinent hypothesis, which the Court took from the consideration of the jury, when it limited their deliberations to the mere truthfulness of Captain Loesewitz's evidence on the two point of "*his receipt of the package of diamonds in Antwerp and bringing them here.*" The dedendant was entitled to the benefit of the doubt, which might be raised, as to the identity of the package, and by the uniform custom of the Captain in submitting such packages to the custom officials for examination. The jury might have believed the two propositions to which the jury were limited. and still had a doubt as to defendant's guilt. *There was nothing said at the Café Alsacienne as to smuggling of the diamonds, or omitting to submit the same to the officers of the revenue for examination, after the arrival of the ship in port.* If things had taken their usual course, and Revenue Officer Gallen had not been over zealous, in the ordinary course of events, this package would have been submitted to the revenue officers for examination in a way different than they were submitted. (This brief, p. 77.) The mere fact that Captain Loesewitz may have incurred penalties for the omission of formalities, does not affect the question of the offense charged in the second count of the indictment, or the fact that bringing over packages on former occasions, and submitting them to the officers of the revenue, had not subjected him to penalties. It was wrong for the Court to take from

the jury all of the evidence of all of the witnesses, including Captain Loesewitz, except two very small portions of Captain Loesewitz's testimony, save as it might bear on Captain Loesewitz's veracity. This action of the Court was doubly prejudicial, as it was a case of identity and of oath against oath.

As we have shown (this brief, pp. 65–66), the crime charged in the second count of the indictment consists of eight elements. The case should have been submitted to the jury with instructions that they should find the defendant guilty if they found the existence of the eight elements, and find the defendant not guilty in the absence of proof, beyond a reasonable doubt, of all the eight elements. *Mills vs. United States*, 164 U. S., 644 (1897). In the case last cited (*Mills vs. United States*, 164 U. S., 644), Mr. Mills, plaintiff in error, was indicted for the crime of rape committed on Florence Hendrix. The Court charged the jury (p. 647):

"The fact is, that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of crime."

An exception was taken to the foregoing part of the charge of the Court. In sustaining this exception and reversing the judgment, *Mr. Justice Peckham* said (p. 646):

"As the verdict of the jury is conclusive upon the merits of the case, it becomes of the highest importance that upon an issue of this kind, maintained by evidence such as this record presents, the Court should charge the jury with accuracy regarding the ingredients of a crime and the facts necessary to be proved in order to show the guilt of the defendant. No portion of the charge of the Court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even although it may be urged that in other portions of the charge the correct rule was laid down."

It is unnecessary to again repeat the evidence and the discrepancies and contradictions therein to show the peculiar applicability of the remarks of *Mr. Justice Peckham* to the case at bar.

VII.

Answer of Court to Request Number Ten for Special Instruction.

(1) It is error for a court, in answer to a request for a special instruction, to affirm the point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness.

(1 a) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt, and inconsistent with any hypothesis of innocence. The Court answered affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charged, as testified to by the prosecuting witness. The effect of such charge is to withdraw from the jury all of the evidence of all of the witnesses, except that of the prosecuting witness, and confine his testimony to so much thereof as pertain to the smuggling charge, as testified to by him, and is error.

(1 b) It is error for a court to instruct the jury to find a defendant guilty generally under an indictment alleging a violation of three provisions of law, if they find the defendant guilty of one provision, which is not sustained by the law and evidence.

The error here assigned arose in the following manner, the Court, in its general charge to the jury, stated the following (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject, Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, pp. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a

preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, *but the jury must be convinced beyond reasonable doubt, from the evidence*, that the defendant, Herman Keck, is guilty as charged. *Before the jury can find the defendant guilty, the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.*"

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the 10th point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged, *as testified to by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Herman Keck, plaintiff in error, duly excepted to the answer of the learned court to the request for said instruction, number ten (original record, p. 208; printed, p. 112), and the ruling of the court was duly assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

This action of the Court was erroneous in three respects:

First.—The Court was asked to instruct the jury that they must be convinced beyond a reasonable doubt, from all the evidence, of the defendant's guilt. The Court said that it affirmed the point generally, but confined the investigation to the one question of being convinced, from all the evidence, that the defendant was guilty of smuggling, charged, *as testified to by Captain Loesewitz*. This much of the question has been heretofore discussed under the part of the charge excepted to (brief, pp. 126–133), and is subject to the same criticism as the modification of the charge in *Brown vs. United States*, 159 U. S., 100, 102, 103 (1894).

Second.—The Court was asked in this instruction to say that before the jury could find the defendant guilty the evidence must be consistent with hypothesis of guilt and inconsistent with hypothesis of innocence. The court, in its answer, while affirming the tenth point generally, nullified the question of hypothesis by confining the question of guilt to the *smuggling* charged, *as testified to by Captain Loesewitz.* This practically excluded all presumptions of innocence, all the testimony of all the witnesses, except Captain Loesewitz, save as it might bear upon his veracity; and all testimony of Captain Loesewitz as to his general custom in bringing over such packages, which would have supported the hypothesis that he intended, as in all former cases, to submit this package to the revenue officers for examination. Wharton, Criminal Evidence (9th Edition), Section 21, last sentence; 2 Thompson on Trials, Section 2505.

Third.—We have shown that there was no *smuggling* according to the testimony of Captain Loesewitz (this brief, pp. 65–82), and therefore it was peculiarly error to say that the jury must find Mr. Herman Keck, plaintiff in error, guilty *generally* if they believed him "guilty of the *smuggling* charged *as testified to by Captain Loesewitz.*" (This brief, p. 75).

VIII.

Error for Refusing Application for Dedimus.

(1) It is a maxim that that which is plain is not to be interpreted or construed. When language is plain and unambiguous a refusal to recognize its natural obvious meaning indicates a purpose to change the law by judicial action, and the courts will refuse to depart from such natural obvious meaning. The Revised Statutes must be treated as a legislative declaration of the statute law on the subjects embraced therein on the first day of December, 1873. When that meaning is plain and unambiguous the courts must adhere to it, and can not resort to extraneous aids. It is a condition precedent to a right to resort to a law repealed by a revision that an ambiguity exists in the law as contained in the revision. When the meaning of the revision is plain courts can not look to statutes repealed by the revision to see if Congress erred in the revision.

(1b) Revised Statutes of the United States, Section 866, provides that "any court" of the United States may grant a dedimus potestatum in "any case" where it is necessary in order to prevent a failure or delay of justice. The words "any court" and "any case" are plain and unambiguous, and should be given their plain and ordinary meaning. Giving them their plain and ordinary meaning, the words "any court" include a district court, and the words "any case" include a criminal case. Resort can not be had to Section 30 of the Judiciary Act of September 24, 1789, 1 Stat., 90, for the purpose of raising a doubt and then clearing up the doubt by the original statute.

(1c) A person charged with smuggling presented proof in support of an application for a dedimus that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (d) that from the amount of the prosecuting witnesses income and expenditures, a part of his income was derived from sources other than his wages; (e) record evidence of the prosecuting witnesses prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The Court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure of justice, and the action of the Court was based upon a misapprehension of law and fact.

The indictment was returned against Mr. Herman Keck, plaintiff in error, the 18th day of May, 1896, and eight days later, to wit: the 26th day of May, 1896, Mr. Herman Keck, plaintiff in error, moved to quash the indictment, demurred thereto, and upon the Court overruling same, filed a written application for a *dedimus potestatum* to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof an affidavit was presented, setting forth important matters, which would clearly have been material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said ap-

plication, to which ruling of the Court Mr. Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day, by leave of Court, the United States presented an answer to the application for the *dedimus potestatum* (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day, the Court refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22).

The provision of the Revised Statutes under which this application was made is as follows, to wit:

"SECTION 866. *In any case* where it is necessary, in order to prevent a failure or delay of justice, *any of the courts of the United States* may grant a *dedimus potestatem*, to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of Sections 863, 864, and 865 shall not apply to any depositions to be taken under the authority of this section."

The application, which was made eight days after the indictment was found, was as follows (original record, p. 18; printed, p. 6), to wit:

"Now comes the defendant, Herman Keck, and moves the Court for a *dedimus potestatem*, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, and the testimony to be taken is necessary to his defense, and is necessary in order to prevent a failure of justice."

In support of this, an affidavit was filed setting forth (original record, pp. 19–27; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20), that (1) Captain Frank Loesewitz was in the habit and practice of smuggling and charging

therefor; (2) that Captain Loesewitz had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (3) the exact nature of Mr. Herman Keck's business in Europe; (4) that from the amount of Captain Loesewitz's expenditures, he must be deriving an income other than from his wages as captain; (5) record evidence, as the Captain's connection with other smuggling transactions and prosecutions therefor, of which Mr. Herman Keck learned by cablegram eleven days before making his application for the *dedimus;* (6) that the general reputation of Captain Loesewitz for truth and veracity was bad.

The Government filed an answer, by leave of Court (original record, pp. 28–32; printed, pp. 10–11); original record, pp. 55–57; printed pp. 20–21), in which was set forth: (1) that Section 866 did not apply to criminal cases; (2) that the application came too late; (3) that the evidence went to the credibility of said Captain Loesewitz, as a witness, and that the defendant would have been concluded by his answers thereto; (4) that no notice was given of the application, and the same was not made conformable with common usage; (5) that there were no interrogatories filed; (6) that Herman Keck, plaintiff in error, had the means to procure the attendance of the witnesses; and (7) that the matter rested in the discretion of the Court.

The Court refused the application on two grounds, in the following language (original record, pp. 33–35; printed, pp. 11–12; original record, pp. 57–58; printed, p. 22), to wit:

"The application referred to yesterday is refused on two grounds:

"*First.*—That the statute relied upon is not applicable to the criminal court, nor to trials of causes therein.

Second.—That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it

should be held that the application comes too late; that it might have been made months ago, and all delay in consequence of it avoided."

We will consider the answer of the Court in its two parts:

First.—Section 866 of the Revised Statutes of the United States does apply to criminal cases, and it has been so ruled in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), and *United States vs. Cameron, et al.*, 15 Federal Reporter, 794 (1883), and stated in 1 Foster's Federal Practice (2d Ed.), Section 288, p. 518.

"The Judiciary" constitutes Title XIII of the Revised Statutes of the United States. "Evidence" forms the seventeenth chapter of this title. An examination of the fifty-two sections contained in this chapter shows that both criminal and civil cases are covered by its language. The question hinges upon a construction of the words "in any case," and "any of the courts of the United States." The words, "any case," according to their natural, as well as their technical import, would include both civil and criminal cases. The words, "any court of the United States," according to their natural and technical meaning, would include District courts of the United States. It is a first rule of interpretation that that is not to be interpreted or construed, which is plain. *Lake County vs. Rollins*, 130 U. S., 662, 670 (1889); *Woodbury vs. Berry*, 18 Ohio St., 456 (1869); *Diem vs. Millikin*, 6 Ohio Circuit Court Reports, 357 (1892); *Shellenberger vs. Ransom*, 59 N. W. Rep., 935 (1894); *United States vs. Hartwell*, 6 Wall, 385, 396 (1867); *United States vs. Wiltberger* 5 Wheaton, 76, 95–96 (1820); *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1, 36–37 (1895); *Thornley vs. United States*, 113 U. S., 310, 313 (1885); Maxwell on Interpretation (3d English Ed., 1896), 4; Black on Interpretation, pp. 1, 8, and 15; Sutherland on Statutory Construction, Sec. 234, p. 309; Sec. 236, p. 312; Sec. 237, p. 312; Sec. 238, p. 315 Wilberforce Statute Law (English Ed., 1881), 99–100; Hardcastle on

Construction (2d English Ed., 1892), 76; Vattel Law of Nations (Edition of 1879), Book 2, Chap. 17, Sec. 262.

It was well said by *Mr. Justice Harlan*, in *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1 (1895), at pages 36–37, that:

"In our judgment, the language used is so plain and unambiguous, that a refusal to recognize its natural obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based on some supposed policy of Congress."

Applying this rule to the words "any case" and "any court" there is no need of interpretation or construction, and giving these words either their plain and ordinary meaning, or their technical meaning, they include criminal as well as civil cases; district as well as circuit courts.

In *United States vs. Cameron*, 15 Federal Rep., 794 (1883), *Judge McCrary* delivered a very elaborate opinion (in which *Treat, J.*, concurred) as to the application of this section to criminal cases.

Circuit Court Judge Pardee, who delivered the opinion of the Court in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), said:

"It is so abhorent to all ideas of justice, that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case, may be, and probably is, unprecedented in the United States Courts in criminal cases, but I am informed is permitted in State Courts of Georgia, and is allowed by statute in other States. At all events, the Government can not be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined, and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be

considered by the Judge who shall be called upon to exercise the large discretion given by the statute, in imposing sentence in the case. Let the commission issue as prayed for; the District Attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned ten days before the next term of this Court."

In Foster Federal Practice (2d Ed.), Sec. 288, p. 518, it is stated that this section applies to criminal cases.

It was urged by the learned Assistant Attorney-General that Sec. 866 of the Rev. Stat. was taken from Section 30 of the Judiciary Act of September 24, 1789, Chapter 20, 1 Stat., pages 88–90. Where the language of a Revision is plain and unambiguous, it is improper to resort to an original statute for the purpose of raising a doubt, and then clearing up the doubt by the original statute. The condition precedent to the right to resort to a law not in force is the existence of an ambiguity in the law in force. *United States vs. Bowen*, 100 U. S., 508 (1879); *Arthur vs. Dodge*, 101 U. S., 34, 36–37 (1879); *Vietor vs. Arthur*, 104 U. S., 498, 499 (1881); *Deffebach vs. Hawke*, 115 U. S., 392, 402 (1885); *Cambria Iron Co. vs. Ashburn*, 118 U. S., 54, 57 (1886); *United States vs. Lacher*, 134 U. S., 624, 626–627 (1890); *Bate Refrigerating Co. vs. Salzberger*, 157 U. S., 1, 39 (1895). An intention is plainly manifest to include both civil and criminal cases in the words "any case." Since the original Judiciary Act of September 24, 1789, 1 Stat. at L., 73–93, almost every State of the Union had passed a statute permitting the taking of depositions by a defendant in criminal cases, and it was but natural that when it came to revise the entire body of statute law that the progress of the cause of humanity, right, and justice should manifest itself in the written law. The argument of the learned Assistant Attorney-General is fully answered by *Mr. Justice Harlan* in *Bate Refrigerating Co. vs. Salzberger*, 157 U. S., 1 (1895), at page 39, to wit:

"Another suggestion in behalf of the plaintiff is, that in the case of a revision of statutes, neither changes of phraseology nor a different arrangement of clauses in themselves show an intention to change or alter the existing law; that the new law should be held to mean what the prior law meant, unless a purpose to change or alter is manifested by clear, unambiguous language, and that, in the interpretation of any particular part of a revision, resort may be had to the previous law on the subject, whenever the revisers have not, in explicit language, disclosed their meaning. The circumstances under which the courts may look at prior laws, for which a revision has been substituted, are stated in *United States vs. Bowen*, 100 U. S., 508, 513. That case depended upon the construction to be placed upon certain sections of the Revised Statutes. *Mr. Justice Miller*, speaking for the Court, said:

'The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.'"

In *United States vs. Bowen*, 100 U. S. 508 (1879) the matter is thus put by *Mr. Justice Miller* (pp. 512–514):

"The question, therefore, is whether we shall read the section 'all pensioners' or 'all *such* pensioners.'

"The word, however, as there used, has an appropriate reference to the class of pensioners who have not contributed to the funds of the institution, and no sound canon of construction will authorize us to disregard it, where to do so changes very materially the meaning of the section.

"It is urged, in opposition to this view, that, as the law stood prior to the revision, as shown by the act of March 3, 1859 (11 Stat. 431), *all* invalid pensioners who accepted the benefit of the home were bound to surrender to its use their pensions while there, and it must be conceded that such was the law.

"But as the revision embraces that act as well as all others on the subject, it is, by the express language of the repealing clause—Sec. 5596—no longer in force. Counsel for Govment, admitting that it is no longer in force, independently of the section of the revision which we are called on to construe, insist that a resort may be had to the law which was the subject of revision, to interpret anything left in doubt by the language of the revisers.

"This principle is undoubtedly sound; and, where there is a substantial doubt as to the meaning of the language used in

the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when neeessary to construe doubtful language used in expressing the meaning of Congress. If, then, in the case before us, the language of Sec. 4820 was fairly susceptible of the construction claimed by the Government, as well as of the opposite one, the argument from the provision of the statute as it stood before the revision would be conclusive. But, for the reasons already given, we are of opinion that the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation, leave room for no other construction than that only invalid pensioners who had *not* contributed to the funds of the Soldiers' Home were bound to purchase its benefits by surrendering to it their pensions."

In *Deffeback vs. Hawke*, 115 U. S., 392 (1885), *Mr. Justice Field* said (p. 402), that:

"No reference, . . . can be had to the original statutes to control the construction of any section of the Revised Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given it in the revision."

Applying these simple rules to Section 866 of the Revised Statutes, the conclusion necessarily follows that the words "all cases" include criminal cases as well as civil cases, and that resort can not be had to Section 30 of the act of September 24, 1789, to give them a more limited meaning.

Even if it be conceded that it is proper to look to Section 30 of the Judiciary Act of September 24, 1789, 1 Stat. at L., 90, the conclusion does not follow that the right did not exist to take depositions in criminal cases prior to the revision of 1874. Said Section 30, after providing for the manner of adducing evidence, contained a proviso that nothing therein contained should be construed to prevent "any court" from granting a *dedimus potestatem*. Its language is broad enough to cover

criminal cases as well as civil cases. *United States vs. Cameron*, 15 Fed. Rep., 794, 795–796 (1883).

Second.—The learned Trial Court gave as a second reason for refusing the application, that the circumstances did not call for its application *at that time*. Captain Loesewitz's name appeared indorsed upon the indictment as the prosecuting witness. It was a case of oath against oath. It would become very important to impeach his testimony by documentary evidence and testimony of his bad reputation for truth and veracity. It was proper to show his business relations with the New Jersey merchant, with whom he admitted he had long relations of friendship (original record, pp. 72–73; printed, p. 31), and from whom Captain Loesewitz obtained a business card (original record, pp. 73–74; printed, pp. 31–32), which Captain Loesewitz gave to Mr. Van Hammelrick (original record, p. 75; printed, p. 32). He also testified that upon the package he received from Mr. Van Hammelrick at the Café Alsacienne he wrote an address (original record, p. 78; printed, p. 34), while the package seized had no address upon it (original record, p. 95; printed, p. 44). He also testified that he hoped to better his own chances of getting off by testifying against Mr. Herman Keck, plaintiff in error (original record, p. 90; printed, p. 42).

The Court further stated that Herman Keck could have procured the presence of these witnesses from Europe. In this the learned Trial Court was clearly mistaken, because there was no evidence that they would cross the ocean, and it is not to be supposed that the business men mentioned in the affidavit, or Mr. Van Hammelrick, who was accused by Frank Loesewitz with being mixed up in the transaction, would come to America; and, in addition, there were other witnesses, whose names Mr. Herman Keck could not then give; and there was documentary evidence, information of which he had just received. The learned Trial Court further stated that the application came too late, as it might have

been made months before. In this the learned Trial Court was clearly mistaken, both in law and in fact, because the indictment was returned eight days before the application was made, and Mr. Herman Keck was arraigned on the 27th day of May, 1896, the day of the second refusal of the application and the day following the first refusal thereof. To be sure, Mr. Keck had been arrested February 14, and bound over to the Grand Jury March 18, and indicted May 18, 1896. He was not compelled to anticipate an indictment, and had a right to rely on the protection of Article VI of the Amendments to the Constitution, that he could not be called upon *to answer* to a criminal charge until accused by the indictment of a Grand Jury. The Constitution, statutes, and rules of procedure are to be construed together. *Kentucky Railroad Tax Cases*, 115 U. S., 321, 334 (1885).

If it be said that this was a matter within the discretion of the Trial Court, that discretion was grossly abused, and the conclusions of the learned Trial Judge in his attempted exercise of discretion was based upon erroneous conceptions of clear and admitted facts appearing upon the records of his own court.

The United States District Attorney claims he had no notice, but that he did have, is shown by his asking and obtaining leave of Court to file an answer (original record, p. 54; printed, p. 20), which was done.

It was unnecessary, as set forth in the answer of the District Attorney, that he should have been furnished with interrogatories, because the interrogatories are prepared and filed after the making of an order allowing the *dedimus*, as was done in the case of *United States vs. Wilder*, 14 Federal Reporter, 393 (1882). The same rule is laid down in 1 Foster's Federal Practice (2d Ed.), Section 288, p. 518. At all events, the Court overruled the application upon two grounds mentioned in the answer, filed by the United States District Attorney, and virtually thereby overruled the other grounds.

Nor, as contended by the learned District Attorney, does the manner of granting depend on common usage, but, as the statute says, the taking of the evidence, after the *dedimus* is issued, is to be according to common usage. (Rev. Stat. U. S., Sec. 866.)

Section 866 of the Revised Statutes of the United States provides for the issuing of a *dedimus potestatem* in any case where it is necessary, in order to prevent a failure or delay of justice. The affidavit filed made out a *prima facie* case for a *dedimus*. The Court did not rule or find that it was not necessary in order to prevent a failure or delay of justice. If it had assigned this reason, a more difficult question might have arisen. But the Court gave other reasons for its refusal. Of course, we concede that the Court said that the application might have been made months before, and all delay in consequence of granting it avoided, but as the Court was laboring under a misapprehension of law and fact, an error was committed, and the action of the Court was not the exercise of discretion. The Court committed an error.

IX.

Sentence Erroneous.

(1) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541.

(1a) Where a person was indicted and convicted for a violation of Section 2865 and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania.

(1b) Where there is a valid sentence as to a fine and an invalid sentence as to the imprisonment, and the Court has power to impose fine or imprisonment, the one can be separated from the other, and a reviewing court will affirm as to the fine, issue a mandate to that effect, and declare the imprisonment void.

The Court having overruled a motion for a new trial, proceeded to pronounce sentence (original record, p. 45; printed, pp. 15–16) as follows, to wit:

"And thereupon, on the 9th day of June, A. D. 1896, all and singular, the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of $200.00; that he be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said Commonwealth."

Revised Statutes of the United States, Section 5541, provides that in every case where any person is convicted of any offense against the United States, is sentenced to imprisonment *for a period longer than one year*, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held. Supreme Court of the United States, in *Bonner's case*, 151 U. S., 242 (1894), held, that imprisonment in the said penitentiary was only permissible where the sentence was for a period longer than one year. In the case on trial the sentence was not longer than one year, and was but for one year and the payment of a fine. In the case cited the Court held that the sentence was null and void, as being beyond the power of the Court, and discharged the petitioner on a writ of *habeas corpus*. The same conclusion was reached in the case of *In re Mills*, 135 U. S., 263, 270 (1890).

In the case at bar the judgment consisted of two distinct parts, the first, a fine of $200.00 and the costs of the prosecution; the second, imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year. Each part was capable of being separated from the other because the act of February 27, 1877, 19 Stat. 247, amending Section 2865 of the Rev. Stat. provides for fine *or*

imprisonment *or* both. The Court proceeded to impose a valid fine, which it had power to impose without imprisonment, and then proceeded to impose an invalid imprisonment. That they are separate, distinct, and severable is further apparent from the fact that one bond is taken on writ of error for the fine and the cost (original record, pp. 231–232; printed, pp. 121–122); and a separate bond on writ of error for the imprisonment (original record, p. 234; printed, pp. 122–123). In case the judgment of the lower court be affirmed, it is proper to affirm the judgment as to fine and cost and declare it null and void as to the imprisonment and issue a mandate to the trial court affirming the judgment as to the fine and costs and order execution thereon. *United States vs. Pridgeon*, 153 U. S., 48, 62 (1894). In this case *Mr. Justice Jackson* (at p. 62) said:

"The principle is established that where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence."

And again (at p. 63):

"It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion."

X.

In Conclusion.

The three counts of this indictment were fatally defective, omitted matters of substance, and stated no crime. All ways of raising this insufficiency were taken, including a demurrer. The defendant was rushed into a trial eight days after his accusation, and denied the privilege of taking testimony in Europe, where the main transaction was alleged to have taken place, where the prosecuting witness lived, whose testimony it was desired to impeach. The application for a *dedimus potestatem* was denied upon conclusions based upon premises, fallacious in law and fact. The case was oath against oath, and turned up on imperfect identification. The only witness, who was under indictment, testified in hopes of bettering his own chances of getting off, and contradicted himself in important particulars. The *corpus delicti* was unproven.

Special instructions were modified to exclude, in effect, the doctrine that all the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence. An illegal sentence was imposed. Vital errors, prejudicial to the rights of Mr. Herman Keck, plaintiff in error and a citizen of the United States, were committed, and he was denied a fair and impartial trial, guaranteed to him by the Constitution of the United States while an alien was shielded from attacks as to his veracity and criminality. To quote from a brief of *Mr. Solicitor-General Conrad*, as did *Mr. Justice Peckham* in the *Tla-Koo-Yel-Lee Case*, 167 U. S., 274, 278 (1897), "the mind is oppressed with a painful doubt as to the soundness of the verdict returned by the jury." The conviction should be set aside, the indictment quashed, and Mr. Herman Keck freed from an annoying prosecution, so that he might go about his way develop-

ing the new and great diamond cutting industry at Cincinnati, which he attempted to bring to the attention of the Court by his *dedimus potestatem* and the excluded evidence of the witness, Mr. Franz Van Reeth.

Respectfully submitted,

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,

Counsel for Herman Keck, Plaintiff in Error.

CINCINNATI, October 9, 1897.